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SOME OBSERVATIONS ON IE DRAFT CONSTITUTION

BY

D. R. GADGIL

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ECONOMIC EFFECTS OF IRRIGATION.

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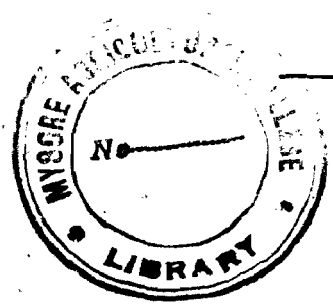
The Survey was undertaken by the Institute for the Government of Bombay and was conducted during the years 1939-1940. The aim of the Survey was to assess the total direct and indirect benefits due to a particular irrigation project. The problems involved in the investigation, the method adopted for it and the assumption that had to be made in carrying it out have, however, an interest much beyond the results of the particular work. The investigation is closely related to the general problem of assessing results of all kinds of irrigational or reclamation projects. It also furnishes useful original data regarding many aspects of farming, dry and irrigated and incidentally throws a great deal of light on the quantitative relations between various economic activities in Indian rural economy and on the important problem of the results of investment on employment and distribution of income.



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SOME OBSERVATIONS ON THE DRAFT CONSTITUTION

By

D. R. GADGIL.

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PREFACE

The study which has resulted in this publication was projected in May 1948 as a series of notes on salient features of the Draft Constitution of India. The notes, with many interruptions in writing, continued to grow until it was thought that they might best be embodied in a separate publication. No attempt has been made in this publication at giving a connected account of the genesis, form and contents of the Draft Constitution of India. It confines itself to seeking out the main gaps, maladjustments and defects of the provisions of the Draft Constitution and suggesting suitable amendments. In doing this frequent reference has been made to the provisions of the constitutions of other federations and their interpretations and working.

In a critical study of a constitution in the making it is an advantage to have a clear idea of the political objectives and constitutional concepts of its framers. It can hardly be said that these are available to a student of the Draft Constitution of India. There has not been a sufficient discussion of first principles or any attempt to lay down the theoretic foundations of the constitutional structure either in the proceedings of the Constituent Assembly or in the press or public during or after the work of the Assembly. On a close study the Draft Constitution would appear to be a structure erected primarily under the influence of the 1935 Act and secondarily that of the British Dominions. 1935 Act and secondarily that of the Constitutions of the British Dominions. There has been some borrowing also from federal constitutions of countries outside the British Empire. It is also apparent that constitution-making was too interrupted and the main participents in it too engrossed with other matters to have worked out a consistent theoretical frame of reference. In the circumstances, little space has been devoted in this publication to what might be considered to have

been the ideas of the framers of the Constitution. The salient features of the Constitution and its main provisions have been examined from the point of view of a fully federal representative democracy working according to a cabinet system of government, which, in the existing circumstances, seems to be the most suitable constitutional type for India to begin its modern political career with.

The view taken of the evolution of the Draft Constitution in writing this study and the frequent comparisons with provisions in other federal constitutions appear to have been justified. This may be inferred from the following quotation from an article by Sir B. N. Rau which appeared after the first draft of this study had been completed: "It is undoubtedly true that the Draft has borrowed from other Constitutions and notably from the Act of 1935..... To profit from the experience of other countries or from the past experience of one's own is the part of wisdom. There is another advantage in borrowing not only the substance but even the language of established constitution; for, we obtain in this way the benefit of interpretation put upon the borrowed provisions by the courts of the countries of their origin and we thus avoid ambiguity or doubt." The above would appear to justify not only the point of view adopted in making this study but also the form given to the criticisms of constitutional provisions in it.

Gokhale Institute of Politics and
Economics, Poona 4.
14-10-48.

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(A) PROVISIONS OF THE DRAFT CONSTITUTION.

The units in the federation, the Indian Union, are not all on the same footing. The first schedule divides the territories of the Union into four parts. Part I includes the Governor's Provinces of British India, Part II the Chief Commissioner's Provinces, Part III the Indian States and Part IV the Andaman and Nicobar islands. The distinction in constitutional status between the territories included in Parts I and II is material. The territories included in Part II may be called the "federal" or the "centrally administered areas." In respect of these areas the relations of the government of the area with the Government of the Union is the relation of local to central government and not a relation of the federal type. On this account the division of powers and revenues laid down for governments in Part I is not applicable to governments in Part II. Further, it is not necessary to provide for the constitution of governments for areas in Part II in the Constitution of the Union in the same manner as for those in Part I. The structure of governmental authority for areas in Part II is a matter completely under the jurisdiction of the Union Government and need not, therefore, be laid down in the Constitution of the Union. The special position accorded to Andamans and Nicobars also appears justified. These distant islands may have to be treated, in initial years, as administrative units not on a par with other units in the Union and their semi-colonial status may require special treatment.

In most federations provision is usually made for two types of areas besides the federating units. These are usually termed the "federal area" and the "territories." The federal area is ordinarily limited to the area of the seat of the federal government and the territories are areas usually of a semi-colonial status in which it is not possible to organise governments on the model of those in the federating units. In the first schedule of the Draft Constitution of

India, Delhi, among areas mentioned in Part II corresponds to the federal area and Part IV comprises what may be termed territories. The position of Ajmer-Merwara and Coorg in Part II now becomes anomalous. There is no longer any reason why Ajmer-Merwara should not be incorporated into a Union of the States of Rajaputana of which the territory clearly forms a part. Coorg may either join Mysore or a Unified Karnatak; if, however, it establishes a case for maintaining its separate identity, it should be transferred to Part I and become a federating unit.

The greatest anomaly in the Draft Constitution is that presented by the differentiation in treatment between states in Parts I and III. States in both these Parts appear to be treated as fully federating units and yet the constitutional provisions relating to them vary materially. For example, nothing regarding the constitution of the government of states in Part III is contained in the Union Constitution. Part VI of the Draft Constitution which deals with States is confined in its application to part I of the first schedule. Parts VII and VIII of the Draft Constitution deal briefly with states in Parts II and IV of the schedule respectively.

The governance of states in Part III of the schedule, however, finds no mention in the Draft Constitution. This omission must be considered very serious. Constitutionally, it can only mean that the structure of the constitution, legislative and executive, of units mentioned in Part III is beyond the purview of the Constituent Assembly. As this subject is not included in the Draft Constitution, the characteristics of these governments in the present or their modification in the future will not be governed by procedures mentioned in the constitution and will not be subject to any limitations laid down in it.[1]

1 Article 67 (3) (c) of the Draft Constitution would seem to imply that a state in Part III may even have no house of legislature. Also in Article 3 while for states in Parts other than III the legislatures of the states are mentioned, reference is made only to states in Part III and none to their legislatures.

There appears to be no valid reason why a number of federating units of the Union should thus be treated separately. In the matter of privileges of membership of the Union these units are on a par with other units in the Union. The representatives of these units are taking part with those of the other units in the formation of the constitution. In these circumstances the entire omission from the Draft Constitution of any mention of the constitutions of states in Part III cannot be explained or understood.

The omission may have very serious consequences in the future. A change in the internal constitutions of the units in Part III could be brought about without its being subject to any fundamental constitutional processes and limitations. This will leave room for variations in the types of constitutions and scope for rapid changes in individual units which may have disturbing consequences. There is no constitutional provision against a *coup d'etat* taking place in these States and it is doubtful whether even the emergency provisions of the constitution will be operative in case of a matter completely internal to any of these States. Also within the Union there will be no guarantee of a minimum degree of constitutional homogeneity. It is necessary that this defect be rectified as early as possible and a part dealing with the constitutions of states in Part III of the first schedule be incorporated in the constitution.

It would appear that whereas the incorporation into the Union of the states in Parts I, II and IV takes place through the activities of the Constituent Assembly the adhesion to the Union of States in Part III is effected by and is also governed mainly by the agreement, entered by these States with the Government of India. The constitutional validity of such agreements and their duration or the possibility and manner of change in their terms are nowhere mentioned in the Draft Constitution. The exception made in Article 225 is unqualified and it is not clear to what extent the relations of states in Part III with the Government of the Union will, in future, be governed by

conditions and terms which are extra-constitutional, i.e., which find no place in the Constitution of the Union.

We have at present a Ministry of States and a new doctrine of paramountcy in relation to States has emerged since August 15, 1947. Such arrangements are appropriate only when, as under the British, the States are not integral components of the constitutional structure. The States under the British were units external to, though closely allied to or controlled by, the Government of British India. Special provision for the regulation of relations with the States and the concept of paramountcy were appropriate to these conditions. They should vanish as soon as the new Indian Union comes into existence, as they would have vanished even if the federal part of the Act of 1935 had come into operation. The federal structure of the 1935 Act was not the strusture of a well-knit federation. It allowed for large difference in the status of federating units and resembled more a confederacy than a federation. This aspect of the 1935 Act was sharply criticised by Indians in British India and there was then an almost unanimous demand that the representatives of Indian States in the Federal Legislature should not take part in federal matters affecting British India only. In all existing federations the relations of all the units in the federation with each other and with the federal government follow the same pattern and are governed by the same constitutional provisions. It is necessary that on the formation of the Union, the constitutional position and structure of the Indian States should be brought completely into line with those of the older provinces.

The constitutions of all federations do not contain detailed provisions relating to the constitution of the federating units. The British North America Act and the Constitution of the Union of South Africa define the structure of the provincial constitutions in Canada and South Africa respectively. The Constitution of the U.S.S.R. also defines the structure of the organs of State Administration of the Union Republics. The Constitution of

the German Commonwealth (1919) contents itself, on the other hand, with defining the salient features of a state constitution. It lays down:

> "Every State must have a republican constitution. The representatives of the People must be elected by the universal, equal, direct and secret suffrage of all German citizens, both men and women, according to the principles of proportional representation. The State Cabinet shall require the confidence of the representatives of the people.
>
> The principles in accordance with which the representatives of the People are chosen apply also to municipal elections; but by State law a residence qualification not exceeding one year of residence in the municipality may be imposed in such elections." (Art. 17)

The Constitution of Australia does not prescribe the constitution of the constituent states. However, it specifically lays down that "the Constitution of each State of the Commonwealth shall, subject to this Constitution, continue as at the establishment of the Commonwealth until altered in accordance with the Constitution of the State" (Section 106). This Section refers more particularly to the original federating states which had constitutions already. Regarding new states it is laid down that the Parliament may admit to the Commonwealth or establish new states and may upon such admission or establishment make or impose such terms and conditions, including the extent of representation in either House of Parliament, as it thinks fit (Section 121). The Constitution of the Swiss Confederation guarantees the constitutions of the Cantons subject to the following interesting provisons:— (i) That the constitutions contain nothing contrary to the disposition of the federal constitution. (ii) That they assure the exercise of political rights in accordance with republican forms either representative or democratic. (iii) That they are accepted by the people and can be revised, if an absolute majority of the citizens demands a revision. The

Constitution of the U.S.A. makes perhaps the briefest reference of any, to the constitution of constituent units. It says: "The United States shall guarantee to every State in this Union a republican form of government." (Art. IV Sec. IV.) The phrase conveys guarantee of a collective right to the peoples of individual states and imposes a duty on the federal government. But the provision also enabled the federal government to wield for several years an almost unlimited power of control of the domestic affairs of those states that had been in rebellion against its authority. This was largely through judicial interpretation of the meaning and content of the phrase "a republican form of government." In the light of all this it is imperative that some provision regarding the constitution of states in Part III should be incorporated in the Union, if they are to be treated as integral parts of it.

The special treatment accorded to states in Part III is emphasized by Articles 225 and 258. Articles 225 effects a curtailment of the power of the Union Parliament to legislate, in a manner which cuts at the root of the federal structure. In the light of this Article it is obvious that the Union is not a homogeneous federation at all, i.e. it is not a federation of states similarly constituted, participating on equal terms in an even Union. Whereas states mentioned in Part I agree to a uniform degree of cohesion, the states in Part III are considered as being free to enter into special agreements with the Government of India and to be able to reserve to themselves particular rights in these agreements. The provision is purely unilateral. The States or the groups of States which do not give up to the federation the fullest rights ceded by others yet enjoy to the fullest all the privileges of participating in the Union on the same footing as all the others. In the matter of representation of the House of Peoples or the Council of States or in participating in the legislative or executive power of the Union and for all subjects no distinction is provided in respect of States which do not fully cede their

powers. They will continue in every respect to wield, through their representatives in parliament, the cabinet and others organs of government full power over all subjects included in the Union list of the seventh schedule even though they may themselves have not conceded power to the Union in all these subjects.

Obviously this position is highly anomalous. It has also no justification in existing conditions. The provisions of Articles 225 and 258 have crept into the Draft Constitution by analogy with the provisions of the 1935 Act. There is, however, great contrast between position of the Indian States in 1935 and in 1948, and ideas appropriate to the earlier year are now completely inapplicable. In 1935 the States were, in the main, dynastic principalities whose rulers were able to take their stand on agreements and treaties with the British Government. To-day the dynastic principalities have vanished, in the vast majority of instances, and, in the main, the States mentioned in Part III are newly formed unions of the older territorial units. There is no reason, constitutional or political, why these emergent units should enter the Indian Union on terms different from those laid down for states in Part I, i.e. the older British Provinces. There is, on the other hand, every reason why no difference in constitutional status should be maintained between any two sets of federating units.[2] If such difference is allowed it may tend and to have two consequences. In the first instance the distinction will come to be resented, if it happens, as it must, that one set of units enjoys a degree of freedom from central control substantially greater than another. And this resentment may lead to a demand for formal abridgement of central powers or to an imperceptible whittling of these powers by growth of constitutional convention or by judicial interpretation.

Article 258 is somewhat more limited in the measure of exception it grants than Article 225. This Article provides

2 The statement of the Cabinet Delegation emphsizes the difficultie created by separate lists of powers ceded to the Union.

for an exception to the distribution of revenue sources and heads of expenditure similar to the exception provided by Article 225 to the division of powers. Article 258, however, provides for termination of such exceptional treatment within a period not exceeding 10 years. In matters of finance also it seems no longer necessary to provide for an exceptional treatment of a certain class of units, even for a period of 10 years. Now that the financial and administrative structure of almost all the State Units is undergoing or has undergone radical transformation, the need for a division of revenue sources on a special pattern is no longer present. It is likely that the effects of special terms in matters of taxation might have even graver consequences than those in the division of powers. One illustrative example will make the dangers of differential treatment clear. Through exceptions enjoyed under Article 258 it may be open to a State or a Union of States to levy rates of income-tax, etc. lower than the rates levied by the Union. If this leads, say, to a diversion of industry, the states in Part I or other Parts affected by such diversion would not be able to take any action which would have compensatory effect. For, the rights accruing to citizens and states under Articles 243, 16 and 13(1)(f) and(g) would be enjoyed equally by all states and their citizens whether they give to the Union less or more of revenue. It is clear that a differentiation which might lead to the emergence of such problems is not at all desirable from the point of view of the smooth running of the Union. As pointed above there is also no reason why today such a differentiation should persist.

Article 236 gives power to the Government of the Union to undertake any legislative, executive or judicial functions by agreement with any states in Part III. Article 237 gives similar powers to states in Part I. These are, perhaps, intended to be the provision through which the existing agreements with States in Part III may in course of time, be modified. These Articles do not, however, contemplate any change in the fundamental constitutional

status of the states in Part III. The relations of these States with the Indian Union will continue to be governed by terms of agreements which could not be altered by process of an amendment to the constitution. This is the fundamental difference between the position of states in Parts I and III and the fundamental anomaly. The states in Part III may, in course of time, yield the same powers to the Union as states in Part I; their status will still continue to be different. As a matter of fact, the provision of Article 236 portends a danger to the federal structure by making it possible for the Government of the Union to acquire large powers in respect of a state in Part III. The fact that the relation is governed by a mere agreement between the State and the Union makes it possible for a *maladjustment of the division of powers either way. It* is only when the relation is governed by constitutional provisions applicable equally to all units and capable of modification only by amendments to the constitution that a stabilised federal structure will be attained and maintained.

It may be objected that the peculiar historical evolution and the very recent formation of the areas and constitutions of many units in Part III makes it impossible to apply the provisions meant for states in Part I to them. If the plea is accepted a Union which is homogeneous in its composition cannot immediately be formed. There are no instances of heterogeneous federations; but lack of precedent is itself no bar to the formation of one in India, if circumstances make this desirable for any reason. In that event, however, the fact of heterogeneity, i.e. of the disparity in status as between two sets of federating units must be recognised throughout the structure of the Constitution of the Union. Now that the principle of dynastic rule and political privileges of rulers has been given up, it should not be difficult for the states in Part III to accept immediately the constitutional structure framed for states in Part I. The only imporant difference still remaining between the two is the position of the old ruling princes.

A set of provisions alternative to the existing provisions in Part VI regarding the Governor and Deputy Governor could be framed to provide for this.

It may, however, be thought that the time before the formation of the Union is too short to enable a complete assimilation of the structure of the constitutions of States or State-Unions to that of the Provinces, i.e. states in Part I. This would yet be no reason for completely neglecting the question of constitutions of states in Part III in the Constitution of the Union. Also provision must be made in the constitution for attaining ultimate equality of status and of homogeneity within the federation, even if this is not possible immediately. To achieve these objectives the Union Constitution ought to contain a part dealing with constitutions of states in Part III. This should prescribe the minimum conditions to which all these constitutions must conform. Some form of representative democracy (with or without a prince as the constitutional head) based on adult suffrage and according to a constitution which contains definite provisions regarding the manner of changing it, are the absolute minima of requirements. No unit could or should be admitted to the Indian Union which cannot accept these broad principles. This is the first essential. The second is to provide for inducements through which the states in Part III are led in time to adopt the constitutions prescribed for states in Part I and to give up all the powers given up by states in Part I to the Union. Without such inducements there is no reason why once the Union is formed States in Part III should give up any of the advantages, they may individually enjoy under their special agreements with the Government of India. As has been pointed out above there is no time-limit to the restrictions under Article 225 and there are no constitutional means for their termination. The Ministry of States and the powers under the new paramountcy which brought about such a revolutionary change in the conditions in Indian States during the last year, may no longer exist once the Union is formed. It is, in-

deed, very desirable that this should happen, as there are grave dangers to the working of the Union, if a Ministry exists within its government, which can exercise vague powers over a group of constitutent units and their affairs.

All of which emphasizes the need for providing for a constitutional transition from the status under Part III to that under Part I and for seeing that such a transition will take place. The only inducement that can be given to states in Part III to change of Part I is to differentiate initially in favour of the states in Part I. The Draft Constitution makes no such differentiation. It, thereby, wrongs the states in Part I and holds out little prospect of states in Part III giving up their special position. The privileges enjoyed by states or the people in them under the constitution relate to representation in the Parliament and the Executive of the Union and the freedon of trade and commerce under Article 243. Differentiation can be made in the proportionate representation in both or either house of legislature of the Union as between the two sets of states. It might also be desirable to see that representatives of States granting very limited powers to the Union do not participate in business connected with the other subjects in relation to other states. This was a demand made by British Indian leaders in connection with the Act of 1935. The difficulties in the way of bringing about this differentiation are many. Some of them have been pointed out in the Statement of the Cabinet Delegation. The difficulties are real and they should lead states in Part III to agree to the same status and terms of accession as that of states in Part I. If, however, they do not do this, the differentiation must be brought about in spite of the difficulties. Also states in Part I must reserve to themselves the right to discriminate, if necessary, as between states in Part I and those in Part III in relation to trade and commerce. These proposals may sound unusual and as introducing an element of disharmony within the Union. But the real seeds of disharmony are those contained in the differentiation of status introduced in the Draft Con-

stitution. The objective should be to get rid of this disparity of status at the earliest possible date and bring about conditions of equality and homogeneity between all federating units. On this alone could real and lasting harmony be based. It is necessary to impose temporary disabilities on all States which insist on differential treatment for themselves in relation to central subjects or sources of revenue, and these temporary disabilities must be such as will lead them gradually to give up special privileges accruing under individual agreements.

What will happen if, for any reason, the course insisted upon above of exercising constant pressure, through provisions in the Constitution, on States in Part III to place themselves on the same footing as states in Part I, is not accepted? In this event, sharp differentiation in constitutional position and relation between the two sets of units will become a permanent feature of the Indian Union. The position and relation of all states in Part III will not necessarily be the same; they will be governed by the terms of individual agreements. As the relation of the states in Part III with the Union will not be the normal federal relation special means will have to be devised for meeting the requirements of this relationship, including the relationship with the Raj Pramukh. The agreements with the States will not be parts of the Constitution and their interpretation will not or should not be a matter of judicial procedure but rather that of negotiation between the parties to the agreements. A perpetuation of the Ministry of States will then be inevitable and a shadow of the doctrine of paramountcy will be equally inevitably be cast over the relationship. A Ministry of States, working with the definite objective of assimilating the status of all states in Part III to that of Part I within a short time, may be acceptable as a transitional measure. A Ministry of States and a triangular system of relations-between the Union, the states in Part I and the states in Part III as permanent features will render the working of the federation extremely difficult.

(b) SITUATION DISCLOSED BY THE WHITE PAPER.

The general considerations set out above may be reinforced by reference to existing conditions regarding the units and constitution of Indian States. The White Paper on Indian States (July 1948) records an enormous advance achieved within less than one year's time. At the same time it reveals the temporary and transitional nature of much that has been constructed and the extent of the ground that yet remains to be covered. This is apparent in the directions both of the formation of territorial units. and the constitutional arrangements relating to those units.

We may first consider the question of territorial arrangements. Some States exist today which the Government of India consider non-viable and whose elimination by merger or fusion is, therefore, merely a matter of time. The Government of India started on the campaign of the elimination of the small units with a fairly liberal definition of a viable State. A large number of States would today have continued to enjoy separate existence, if all those who had been deemed viable units had insisted on retaining their distinct identity. Fortunately, a large majority of the viable units have joined unions and there remain today twelve viable units which still retain independence of status. Some of these like Bhopal, Kolhapur and Mayurbhanj have hardly the size of an ordinary district. It is inconceivable that these can permanently enjoy the status of a federating unit or fruitfully exercise powers even greater than those conferred on states in Part I of the first schedule. Indeed, of these twelve viable States none except Hyderabad, Mysore and Travancore approach the size of even the smaller of the units of states in Part I. Now that States like Gwalior have consented to merge their identity in larger territorial agglomerations, it is unnecessary to contemplate the separate existence of these small units as a permanent and durable arrangement. Apart from the three small States

mentioned above three of the twelve states belong to Rajputana. It is but natural that all of these should come together into one State or Union of Rajstan. Indeed, if such a step is not taken the future of even a non-viable state like Jaisalmer will remain uncertain. The State of Baroda is made up of a number of dispersed territories and its administration as a unit distinct from the territories of Gujarat and Saurashtra will unnecessarily complicate both economic and political affairs. The problems of Hyderabad and Kashmir are being tackled on an international plane and their future status must be deemed uncertain today. This leaves for consideration three viable States, Mysore, Travancore and Cochin. Mysore and Travancore may have the resources of small provinces but their independent existence will continue to make impossible the highly desirable step of the formation of the states of Karnatak and Kerala. Means will, therefore, have to be found early for a Union or fusion of the Kanarese and Malyalam speaking areas within these States with those outside them. It is, in the circumstances, clear that the continued separate existence of not even one of the twelve States considered by the Government of India as viable can be contemplated as the long term durable arrangment in respect of territorial divisions.

The six Unions that have been formed can also not be considered as having reached the final stage in territorial adjustments. A federating unit in the Indian Union must in the ultimate form attain a certain minimum of size of population and resources. It is desirable that the number of federating units should not be too many and that each one of them should be able to attain minimum standards of efficiency in the administration of subjects reserved to the states. The aim should, therefore, be to form a unit of not less than, say, 2 crores of population, which is the average population of the existing provincial units. The limiting factors in this process are obviously geographical conditions and linguistic homogeneity. The position of

Assam indicates the limitations imposed by geographical factors and Orissa is the smallest of the present units formed on the basis of linguistic homogeneity. Both these units do not, however, fall far short of a population of one crore. Therefore, unless some overwhelming obstacle stands in the way, a unit of less than one crore of population should not be considered possible or desirable in the permanent set-up of federating units within the Indian Union. None of the six Unions of States approach the one crore limit in population and five of them have populations of even less than fifty lakhs. Moreover, the formation of larger units than the new unions is barred in no case by geographical or linguistic considerations. In one case, the United States of Rajsthan, the formation of a larger unit is prevented because of the non-adhesion to the Union of the bigger Rajputana States like Jaipur, Jodhpur and Bikaner. In respect of the other Unions the limiting factor has been that the territory embraced within each union has been confined to the territory of the States. The concept of the territorial integrity of the old State units has been given up during the last year; the distinction between provincial and State territory has also been obliterated by the merger of the territories of certain States. It only remains to carry the step logically forward and to form combined units of territories of States and Provinces. The Ministry of States does not visualise any insuperable difficulties in the way of the formation of such units. This is indicated by Article XVIII of the Covenant relating to the formation of the Union called Saurashtra. This reads: "Nothing in this Covenant shall be deemed to prevent the Government of Kathiawar from negotiating a Union of Kathiawar with other Gujarati speaking areas on such terms and conditions as mey be agreed to by the Council of Rulers, as well as the Council of Ministers, of Kathiawar." [3]

3 White Paper on Indian States, 1948, p. 63.

This article not only contemplates the formation of a combination of State and Province territory but also, quite rightly, lays down the linguistic consideration as a limiting factor. It may be expected that, in course of time, the Union of Rajsthan will embrace all the territory of the speakers of Rajsthani and that Saurashtra will form part of a Maha-Gujarat. The formation of a Rajsthan on lines indicated above may require the re-formation of the Gwalior-Indore Union. Also, the possibility of extending the limits of that unit so as to embrace other than State territory should make possible a radical transformation of the existing U.P. and C.P. units and the new Vindhya Union to conform more closely with facts of geography and convenience of administration. In this process the Matsya Union, which is a very small union having a population of less than 20 lakhs, must also become merged in a unit of a more reasonable size. The Patiala and the Punjab States Union also can not stand permanently by itself. Its territories will have to be combined with those of the other Punjabi-speaking areas for the formation of a compact and viable unit of the speakers of Punjabi.

Reference may also be made, here, to certain State areas which have been taken up for central administration. The East Punjab Hill States have been consolidated into a centrally administered unit called the "Himachal Pradesh." The reason given for this step is "the desirability of making available to these areas man-power and wealth-power resources of a large administrative unit." [4] Further the State of Bilaspur which was included in these States has been taken over separately as a centrally administered State, "in view of the location in this State of the contemplated Bakhra Dam." [5] Both these steps indicate a development which may lead to considerable difficulties in the working of a federal union. The East Punjab States are units which form part of a large geo-

4 *Ibid.* p. 19.

5 *Ibid.* p. 19.

graphically contiguous and otherwise similar territory. If their area is considered too small for being a separate administrative unit, the proper procedure is not to keep it as a separate unit and administer it centrally, but to merge the unit within the area of the appropriate contiguous or surrounding unit. Central administration of the unit does not make it a large enough unit of independent administration. This separate administration of a non-economic unit is merely made possible by drawing upon the large resources of the centre. The procedure though practicable yet remains wasteful of national resources. Moreover, it denies to the unit and to the surrounding territory the advantages flowing from integration of the total area into a compact whole.

The treatment of the State of Bilaspur raises a fundamental constitutional issue. The possibility of the location of an important dam or any other work in a unit is no reason why the whole unit should be taken up for central administration. If this principle were accepted, central jurisdiction may begin to entrench over large areas or jurisdictions of the federating units. The proper procedure, in such matters, is that adopted under Section 8 of the U.S.A. constitution, under which when any particular place becomes so important for federal activity as to need being under exclusive federal jurisdiction it is purchased from the state by the Government of the United States with the consent of the legislature of the state. Such purchase is confined to specific locations and does not extend over large territories. If this principle is not adhered to, the result will be the creation of a number of dispersed pockets of central authority all over the country. Not merely the possibility of an important central activity but only its actuality in a form which requires exclusive central jurisdiction should lead to acquisition, limited in area to the purpose contemplated. No general extension of central administration should, in any case, be allowed.

The position of Cutch which has also been taken up for central administration is somewhat different. The White

Paper itself puts forward the alternative of the integration of the State in the United States of Kathiawar. The step has not, for the time, been taken because, it is said, the development of the potentialities of the area will require considerable amount of money as well as technical assistance which the newly formed State of Saurashtra could not provide for some time to come. As a purely transitional arrangement the step may be justified. It cannot, however, be made permanent in the Constitution of the Union. The direct central administration of backward areas will raise a number of constitutional and fiscal issues. In case central administration becomes common for areas other than those which have a semi-colonial status, there will exist within the federal Union two types of units, one having a federal relation with the centre and the other which is a mere local authority of the centre. Such diversity in constitutional relationship is undesirable within a federal union. The fiscal difficulties will also arise out of the possible differentiation in the treatment by the centre between the requirements for development of areas within the jurisdiction of the federating units and those directly administered by the centre. Such differentiation will naturally come about; indeed, its possibility is the *raison d'etre* of the central administration of backward areas. But the differentiation is bound to be resented by the federating units. It is, therefore, necessary that the whole of the area within the Union, all its territory, should be apportioned between the various federating units in the light of the appropriate geographic and other considerations and that no administrative unit as such is taken up for central administration because of any special reason. The acquisition of territory by the centre, other than the federal capital and colonial areas, should not go beyond the acquisition of particular places required for specific purposes.

The present territorial disposition of the various State units is thus far from being potentially durable. The constitutional status and arrangements relating to

the older Indian States are also in an equally transitional state. The constitutional position is yet ill-defined. The various Unions have set up Constituent Assemblies charged with the duty of framing constitutions, within the framework of their convenants and the constitution of India, for a Government responsible to the legislature. Most of the States, deemed viable, have also such Assemblies. According to the Covenants of the Unions, formed early, the constitution for the Union could be either federal or unitary; in the later Unions the covenants specify the formation of a definitely unitary government. It is expected that the various constitutions may be similar in structure; it is, however, too early to say what the general pattern will be and how far it will conform to the constitutions prescribed for the states in Part I in the Draft Constitution. It will be noticed that the covenant of each Union contains reference to the framework of the constitution of India. This reference could be made to have a directing force only if the Draft Constitution prescribes certain conditions to which the constitutions of states in Part III must conform.

The constitutions produced by the Constituent Assemblies of the Unions have also to be within the framework of their covenants. Certain features of these covenants must, therefore, be noticed. In the first instance, in the act of coming into force of the constitution framed by each Constituent Assembly, no reference is made to the Government of the Indian Union or any of its authorities or officers. The constitution of each Union is expected to become effective with merely the consent of the Raj Pramukh. The act of constitution-making in the Unions is thus completely self-contained. The constitutions of the states in Part I could be modified only according to procedures applicable to the modification of the Constitution of the Indian Union. The constitutions of these States Unions would, however, be subject to no such restriction. Again, each covenant contains certain provisions regarding a Council of Rulers and a Raj Pramukh

(President of Council) and an Up-Raj Pramukh (Vice-President of Council). Certain powers of this Council have relation to succession in various States and disputes relating to them. These provisions need not be considered to have any important constitutional effects. The succession to the *Gadis* of even merged States have been guaranteed and provision has been made for settling disputes in relation to them.

There are other provision which, however, invest the Raj Pramukh with definite powers. A very important provision relates to military forces. This provision, in the various covenants, takes the following form: "Subject to any directions or instructions that may from time to time be given by the Government of India in this behalf, the *authority to raise, maintain and administer the military* forces of the United State shall vest exclusively in the Raj Pramukh." The provision raises a number of important issues. The list of state subjects in the Draft Constitution definitely excludes the use of naval, military or air forces from the jurisdiction of the states. The list and the exclusion do not, however, apply to states in Part III.[6] In this connection, it is noteworthy that the schedule to the instrument of accession signed by rulers of Indian States in August 1947 is entitled "Matters in respect of which the Dominion Legislature may make laws for this State." The instrument of accession thus vests in the Dominion Legislature power merely to make laws in respect of certain subjects without giving any executive authority over the matters to the Dominion Government *or without taking away the power to make laws in respect* of these subjects from the rulers or legislatures of the acceding states. This loose bond can hardly be called a federal relation. Secondly, the covenant vests the power over military forces exclusively in the Raj Pramukh and nothing that the Constituent Assembly may do hereafter,

6 It may be noted that the Chairman of the Drafting Committee strongly felt that states in Part III should also be precluded from maintaining any armed forces of their own.

can affect this exclusive power of the Raj Pramukh. In this important respect the position of the Raj Pramukh differs radically from that of a constitutional Governor under the constitution, proposed for states in the Draft Constitution of India. The Raj Pramukh, an irremovable head with exclusive control over military forces, becomes a feature irreconcilable with the normal structure of a federal union where both the state and the federal governments are run on the basis of a parliamentary democracy working according to a cabinet system.

The provisions of the covenants also deviate from normal constitutional practice in another respect, i.e. in making the Raj Pramukh subject, in certain matters exclusively within his power, to central directives. The constitutional head of these State Unions has thus not only certain exclusive powers over which neither the legislature nor the cabinet of the Unions has any control, but further in the exercise of these exclusive powers the constitutional head of the state is subject to the directions or instructions of the Central Government. In the covenant of the Madhya-Bharat Union, authority to make laws for the peace and good government of any scheduled area and the control and the administration of certain funds has been placed with the Raj Pramukh, in the same category as the control of military forces. It is highly inimical to the federal principle to have the constitutional head of a state act under the directions of the central authority in respect of subjects within the purview of the state.

The states which form part of the new unions have made the farthest progress towards attaining a constitutional position similar to that of the states in Part I. The Raj Pramukhs of these unions have signed a fresh instrument of accession in which they accede for subjects for which the provinces are today subject to central authority. However, all powers of taxation have been excluded even from this new accession. In this vital matter these Unions are still free of central authority. Moreover, their general relation with the Indian Union is

still not an integrated federal relation governed by a constitution, but only a contractual relation governed by a specific agreement. Clauses 6 and 8 of the new instrument of accession make this clear:

"The terms of this Instrument of Accession shall not be varied by any amendment of the Act or of the Indian Independence Act, 1947, unless such amendment is accepted by the Raj Pramukh of the United State by an Instrument supplementary to this Instrument."

"Nothing in this Instrument shall be deemed to commit the United State in any way to acceptance of any future Constitution of India or to fetter the discretion of the Government of the United State to enter into arrangements with the Government of India under any such future constitution"?[7]

The White Paper on Indian States ventures on the statement that the policy of intigration and democratisation of the Indian States has nearly reached its completion. The brief analysis of the present position will show that this is far from being the case. There are today 8 States considered non-viable by the Government of India and 12 considered viable which are bound to the Indian Union by no other tie than the instrument of accession of August 1947. Their constitutional position *vis-a-vis* the Indian Union is yet extremely unsatisfactory. It has been pointed out above that the process of territorial integration must operate even in relation to the viable States. The new unions cannot also be taken to have reached their final territorial form and their covenants and even their new instrument of accession contains many features which must be eliminated before they are placed in the same relation with the Union as states in Part I.

To say all this is not to detract from the credit of the great advance made during the last year or even to suggest that its pace could have been expedited. It is also not in-

7 *Ibid.* p. 95.

tended to criticise the policy towards major States outlined by the Government of India in March 1948. The *bona fides* of the Government of India must remain, in these matters, above suspicion. The purpose of this analysis is to bring out clearly the fact that there is yet a long way to go in the solution of the problem of the States and that while framing the Constitution of the Indian Union this fact must be constantly borne in mind. It is not possible to force any state to dispose of its territory or to change its status; but it is equally, not necessary to confer on it any privileges not included in the agreement with it. This emphasizes the need for differentiating, at this stage, sharply between the constitutional positions and privileges of the various types of states in the Constitution of the Indian Union. The ultimate aim of creating a homogeneous federal Union must be steadily kept in sight. This aim will not be attained if the states in Part III today are treated in the constitution on a par with states in Part I. Differentiation of status and rights between the types must be immediately introduced in the constitution; so that ultimately all will assist in the formation of the desired federating units and will assume the same federal relation. The mere abolition of princely authority does not guarantee a solution on these lines. The popular assemblies in the States which have acceded only for a limited number of subjects or which are not under the taxing jurisdiction of the centre are not likely to give up their special positions unless forced or induced to do so by the fact of differentiation of constitutional position or privilege which is linked to the differentiation in the quality of accession. The attitude taken up by the Mysore Assembly in connection with the unification of Karnatak has made this clear and has also shown how present differences of status create difficulties in the way of the formation of rational federating units. The position of the States is yet in every way full of anomalies and care must be taken not to stabilise it in its present unsatisfactory state. As a corollary means must also be devised so that it is duly corrected in the proper direction.

II FUNDAMENTAL RIGHTS AND DIRECTIVES OF STATE POLICY.

Part III of the Draft Constitution of India defines Fundamental Rights and Part IV the Directive Principles of State Policy. It has been laid down (Article 8) that all laws previously in force will in so far as they are inconsistent with the provisions of Part III be void; on the other hand, the provisions contained in Part IV are not to be enforceable by any court (Article 29). It is surprising to find in the draft of the fundamental law of the constitution a whole set of provisions which are declared to have no legal validity. This may be considered as the *reductio ad absurdum* of the process set in motion at the time of the framing of the Constitution of the German Commonwealth (1919). That constitution contained a separate elaborate part entitled "Fundamental Rights and Duties of Germans." Previously, beginning with the American War of Independence, democratic constitutions usually contained enumeration of certain rights pertaining to individual citizens framed under the influence of purely individualistic doctrines. The framers of the German Constitution went much beyond this and attempted "to furnish a mirror to German juridical life, and at the same time afford a programme for future juridical development;" they also hoped that these articles "would constitute the basis of the civic and political education of the people." [1] Most constitutions framed after 1919 have been influenced by the German example. This part of the German constitution dealing with Fundamental Rights and Duties made impressive reading; but it mixed up, at least, three separate things: (i) enunciation of general truths; (ii) indicating to future legislatures the course of policy which they should follow; and (iii) making specific provisions having the force of law. In the German constitution these different aspects were not clearly separated. The proce-

1 Brunet, *The German Constitution*, 1923, p. 197.

dure was, no doubt, liable to create some difficulty and afford some latitude in the interpretation of the constitution in a court of law. But given the original aim of the framers of the constitution the mixture and the difficulty were unavoidable. If it was intended to present an integrated picture of existing juridical principles and the future programme which would strike the imagination of the public, the separation of the various parts was impossible. Because they have the same objective and face the same problem, most later constitutions follow the German practice. The phrasing, the emphasis, the classification of the rights and duties may differ from constitution to constitution; but as the intention in every case was to prevent an impressive array of principles and measures, the doctrine, programmes and specific rights are all inextricably woven together in these constitutions. The wisdom of this course is proved by the results of the different approach adopted in the Draft Indian Constitution. The attempt to separate the justiciable rights of the individual from the context of the social programme has left only the individual rights in Part III, dealing with Fundamental Rights. The contents of this part are broadly comparable with the enunciation of individual rights contained in the amendments to the Constitution of the U.S.A. The procedure adopted in the Draft Constitution inevitably robs the residual, i.e. the social programme of all significance and value. The programme is related neither to general principles nor to individual rights. In consequence, it consists of a mere catalogue, not well, compiled, of a series of measures. The poor job that the Drafting Committee have made of Part IV, perhaps, signifies that they were impressed with the futility of the attempt and therefore, paid little attention to it.

Sir B. N. Rau, Adviser to the Constituent Assembly, has put forward an explanation to account for the limitations on the Fundamental R[illegible]onstitution. He writes: "[illegible] like the

American Constitution, the Draft Constitution of India contains an article which in terms states that any law inconsistent with the fundamental rights conferred by the Constitution shall be void; unless, therefore, the Constitution itself lays down precisely the qualifications subject to which the rights are conferred, the Courts may be powerless in the matter." [2] Surely, Sir B. N. Rau is in error when he represents that Article 8 of the Draft Constitution of India puts greater restrictions on the power of courts than those obtaining under the U.S.A. Constitution. Without any positive provision on the lines of Article 8 the supremacy of the provisions of the U.S.A. constitution is well established. The following quotation sets this out: "Independently of express statement to that effect, it has become axiomatic that no statute law is valid if not consistent with the provisions of the Constitution from which the enacting legislature derives its powers. A state statute inconsistent with the Constitution of that state is, therefore, invalid, and an act of Congress not warranted by the provisions of the federal Constitution is similarly void. And the same legal invalidity, of course, attaches to the unconstitutional act of an executive or judicial organ of government. In addition to being subordinate to the provisions of the state Constitution, every act of the state official or organ is required to conform to the requirements of the federal Constitution, and this applies as well to the provisions of a state Constitution, as to the statutes of its legislature."[3] Amendment 1 of the U.S.A. constitution lays down specifically that the Congress shall make no law "abridging the freedom of speech." This has not prevented the U.S.A. Courts from justifying the restraints, cited by Sir B. N. Rau in his article, on the right of speech and expressions of opinion. There is on the other hand, great difference between the limitations on liberty which have been evolved by the

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2 B. N. Rau : Indian Constitution, Hindu, 15-8-48.

3 Willoughby: *Constitutional Law of the United States*, 1910, Vol. I, p, 1.

courts when the right is recounted without stated exceptions in the constitution and the limitations put in the constitution itself. In the latter case the courts have to be guided not by their ideas of what is a reasonable and proper limitation but by whether the action of legislature or the executive is covered by the expressions used in the constitution. And in this matter the bias is usually in favour of assuming constitutionality. There is another vital difference between the protection of rights given by the U.S.A. constitution and that by the Draft Constitution of India. One of the main purposes of the constitutional provisions, like the first ten Amendments of the U.S.A. constitution was to prevent all such previous restraints as had been practised by other governments. On the contrary in the Draft Constitution of India Article 13, which protects the main rights of individual freedom specifically provides that nothing in the various sub-clauses of the Article shall affect the operation of an existing law.

One aspect of the provisions of Part III—Fundamental Rights—needs to be specially emphasized. The Fundemental Rights sought to be protected in Article 13(1) may be divided into three classes. They relate to (i) freedom of speech and association; (ii) freedom of mobility and settlement; and (iii) holding of property and practising a business. Of these the most fundamental from the point of view of liberty are those in the first group. It is these, however, that are subject to the widest exceptions. The right to practise any profession or any trade or business is subject to a less sweeping exception than the others. It is provided in this respect, that the state may make any law imposing restriction on the exercise of the right "in the interests of public order, morality or health." The right to acquire, hold or dispose of property is subject to the power of the state to make laws "in the interest of the general public." The rights of freedom of movement and settlement are similarly circumscribed. There is thus a

difference between the limiation placed on the right to move, reside or hold property and that on the right to practise an occupation or business. The limitation in the one case is general and refers vaguely to the interests of the general public. In the other case the proviso refers more specifically to interests of public order, morality or health. It would, therefore, appear that the fundamental right guaranteed in Article 13(1)(g) is more securely founded than the other fundamental rights guaranteed to the citizens.

The process of judicial interpretation is also likely to result in providing for the protection of rights of property and those relating to economic activity better than rights to personal liberty or freedom of speech. The history of judicial interpretation in the U.S.A. lends support to this view. Apart from the fact that the limitation is less general in the one case than in the other, courts are apt to allow more latitude to the executive and legislative organs in such matters as the invasion of freedom of speech and personal liberty. These latter are affected closely by the exercise of what are called "police powers." Within the sphere of police powers considerable latitude is allowed for the exercise of judgement and discretion by legislatures and executive officers. Mr. Vaze has pointed out that even when rights of freedom of speech or association are guaranteed without exception or saving clauses, interpretation by courts leads to the evolution of a doctrine of ordered liberty, so that ample scope is allowed for all restraint required to be imposed by state authorities in the interest of peace and order.[4] When the rights protected are subject to limitations couched in vague terms the authority, especially of the legislature, to encroach on liberties will be unlimited. Courts will not hold unconstitutional any law which contains the appropriate declaration of inten-

4 S. G. Vaze, *Fundamental Rights in the Draft Constitution of India.*

tion, however drastic its actual provisions. [5] A foretaste of how far such legislation can go has been provided by the numerous acts of provincial legislatures during the last year. In the circumstances the protection given to personal liberties is, as Mr. Vaze has pointed out, so valueless that it might as well be withdrawn.

The right to hold property or to follow a profession or business does not come as often in conflict with the police powers of government as the right to personal liberty or freedom of speech. Therefore, rights such as the right to hold property will in effect be much better guaranteed than the more fundamental rights of personal liberty. Not only will the right to property be better protected but it is even probable that the provisions of Article 13(1) (f) and (g) may make it difficult for the state to undertake close regulation of economic activity or to embark on socialistic ventures. The nationalization of any

5 "The police power of a State has its limits and must stop when it encounters the prohibitions of the Federal Constitution. However, the police power is the least limitable of the exercises of government and its limitations are hard to define, are not susceptible of circumstantial precision, cannot be determined by any formula and must always be determined with appropriate regard to the particular subject of its exercise. Cited in *The Constitution of the U.S.A.* (Annotated) Senate Document, No, 232, 1938, p. 829.

"Each exertion of the police power has support of the presumption that it is an exercise, in the interest of the public, and that there are facts jnstifying its specific exercise. The presumption attaches alike to statutes, municipal ordinances, and orders of adminstrative bodies.

"While it is the duty of the Federal Courts to see to it that the constitutional rights of the citizen are not infringed by the State, they should not strike down an enactment or regulation adopted by the State under its police power unless it be clear that the declaration of public policy contained in the statute is plainly in violation of the Federal Constitution. The legislation, when dealing with a subject within the police power, must be upheld unless shown to be clearly unreasonable, arbitrary, or discriminatory. The broad words of the Fourteenth Amendment are not to be pushed to a drily logical extreme, and the courts will be slow to strike down as unconstitutional legislation enacted under the police power." *Ibid*, p. 830.

particular economic activity or the setting up of a state monopoly in any part of the field of production and distribution would give rise inevitably to one or another type of restrictive action. The maintenance of a state monopoly or a measure of nationalization must lead to some interference with the rights by private individuals to acquire hold and dispose of property or to carry on trade, occupation or business. It is not quite clear that all types of economic regulations would be held to be "in the interests of public order, morality or health." If, as is quite likely, courts hold that economic programmes are not related directly to public order, morality or health, those parts of such programmes which lead to any restrictions on the carrying on of trade and business may be ruled unconstitutional.

The Draft Constitution seems to be concerned with the maintenance of rights of private property more than any other rights. The constitution of no other federation seems to grant these rights in equal detail or with equal explicitness. The Constitution of U.S.A. guarantees these rights in the 5th and the 14th Amendments. The 5th Amendment lays down that no person shall be deprived of his property "without due process of law; nor shall private property be taken for public use, without just compensation." The 14th Amendment adds nothing to the 5th Amendment so far as rights of property are concerned and merely reiterates that a state shall not deprive any person of property without due process of law. The Draft Constitution of India provides very fully and explicitly for the rights guaranteed in the 5th and the 14th Amendments in a special Article 24, entitled "Right to Property." This Article not only provides for the payment of compensation but also lays down the manner in which such compensation must be provided for. The provisions of Article 13(1)(f) and (g) are additive to the provisions of this Article. Therefore, they must be held to secure rights to property additional to those secured by the provision of

right to acquire, hold and dispose of property as well as that of the right to practise any business which may then tend to limiting a large degree the power of the state to regulate economic activity.

The 5th and the 14th Amedments of the U.S.A. constitution, as also Article 24 of the Draft Indian Constitution, confer, what may be termed, a negative right as contrasted with the detailed and positive provisions of Article 13(1) (f) and (g). Even so the wording of the 5th and the 14th Amendments have many times hindered state action in respect of regulation of economic activity. Even in the absence of a positive protection of the right to hold property or practise business it has been held in the U.S.A. that regulation by state affecting property rights would be valid only to the extent that the property or business was "affected with public interest" or by police powers. It should be noted that Clause (3) of Article 24 of the Draft Constitution which provides the exceptions to the operation of the right of property, refers only to "promotion of public health or the prevention of danger to life or property." It is thus narrower even than the sphere of what are termed in the U.S.A. "police powers" and does not at all refer to the concept of "property affected with public interest." In the U.S.A. the present position has been arrived at as a result of judicial interpretation, for which the vague wording of the 5th and 14th Amendments left full scope. It may happen in India that because the limitation on the right to receive compensation is fully stated in the constitution, courts may hold themselves barred from introducing a concept not contained in the written provisos. The concept of "business affected with public interest" may thus never emerge. In its absence all regulation which affects property rights or values and which is not justified on grounds of "promotion of health or prevention of danger to life or property" will be held invalid unless proper compensation to owners of property or business is allowed. Regulation of prices and charges

in the U.S.A. has, for example, been justified where the property or business was affected with public interest. If the concept of public interest is not allowed any place, in this connection, in courts in India—as it may well not be—such regulations may become very difficult.

It should be noted that even when the concept of "business affected with public interest" is accepted its interpretation may restrict the sphere of state action in an erratic manner. The following will illustrate the possibilities of judicial interpretation as practised in the U.S.A.

> "It has been generally held that the power to fix prices and charges exists only where the business or the property involved has become "affected with a public interests." Thus, while laws fixing the charges for service made by grain elevators, stock yards, and tobacco ware-houses, have been upheld, all such business being held to be affected with a public interest, laws fixing the price at which gasoline may be sold, or at which ticket brokers may resell tickets purchased from theaters, or the charges that employment agencies may make, have been held unconstitutional, no public interest being found." [6]

> "It has been conceded that the business of operating a cotton gin is one clothed with a public interest. But the business of manufacturing ice and selling is essentially a private business and not so affected with a public interest that a legislature may constitutionally limit the number of those who may engage in it, in order to control competition." [7]

It is likely that the terms "in the interests of public order, morality or health" which define exceptions to rights under Article 13(1)(g) will be interpreted in the same manner as police powers in the U.S.A. If this happens regulation to the extent that it is permitted by

6 *Ibid*, p. 788.
7 *Ibid*. p. 789.

the police power interpretation will be held valid. But in so far as the wording of Article 24(3) is less general than this proviso, regulation not justified under the wording of Article 24(3) may give rise to claims to compensation even though it is otherwise considered constitutional.

Under the doctrine of police powers there is a wide field for regulations and restrictions of the ordinary licensing type. The present state of the law in the U.S.A. is summarised below:

> "The Constitution does not guarantee the unrestricted privilege to engage in a business or to conduct it as one pleases. Certain kinds of business may be prohibited, and the right to conduct a business, or to pursue a calling may be conditioned. Regulation of a business to prevent waste of the State's resources may be justified, and statutes prescribing the terms upon which those conducting certain business may contract, or imposing terms if they do enter into agreements, are within the State's competency." [8]

Even with this wide interpretation, on a number of occasions, details of licensing, or regulating provisions were held to offened against the guarantee of rights. For example:

> "Statutes have been upheld requiring pilots to be licensed and railroad engineers to pass color blindness tests, but a statute making it a misdemeanor for any person to act as a railway passenger conductor without having had 2 years' experience as a freight conductor or brakeman, is unconstitutional." [9]
>
> "Statutes have been upheld forbidding or regulating the manufacture of oleomargarine, but a statute forbidding the use of shoddy even when sterilized has been held to be so far arbitrary and unreasonable as to violate the due process clause." [10]

8 *Ibid.* p. 834.
9 *Ibid.* p. 843.
10 *Ibid.* p. 844.

It is obvious that with a judiciary adopting a strict attitude in interpreting the wording of the constitution difficulties might be experienced even for the ordinary licensing and regulatory provisions.

It needs to be emphasized that the exercise of police powers covers only general licensing and regulating devices and is not held to justify the fixation of prices, rates, etc. But regulation of economic activity beyond merely licensing, etc., may encounter obstacles from judicial interpretation even when no fixation of prices, etc. is attempted.

> "The provisions of the Bituminous Coal Conservation Act of 1935 (49 Stat.991), which authorized a specified majority of producers and miners to fix maximum hours, and minimum wages within the several districts, compulsory upon the minority by virtue of the tax rebate (13 per cent of the 15 per cent tax on coal at the mine) to members of the coal code, and denial of Government purchases, was held to be an unconstitutional interference with personal liberty and private property." [11]
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> "A Philippine statute which, as construed, absolutely prohibited all Chinese merchants from keeping any accounts in Chinese, was unconstitutional, as depriving the Chinese "of their liberty and property without due process of law" and denying them "the equal protection in the laws." [12]
>
> "The District of Columbia Rents Act of 1919 (41 Stat. 298, title II) which was declared to be necessary because of emergencies growing out of the war, created a rent commission with power, after hearing, to fix rents; and permitted tenants to remain after expiration of leases, so long as they continued to perform conditions fixed by lease or by the commission. It was upheld, against the argument that it deprived owners of free use of their property, on

11 *Ibid.* p. 636.

12 *Ibid.* p. 637.

the ground that the public interest required temporarily some degree of public control, and the Court did not feel itself warranted in saying that the control actually exercised went so far as to violate the Amendment. When, however, Congress undertook in May 1922 to extend the act, again on the declared ground of emergency, for a further period of 2 years, the Court held that it was open to the courts to inquire whether the exigency still existed upon which the continued operation of the law depended." [13]

"The first Frazier-Lemke amendment to the Bankruptcy Act (48 Stat.344) requiring a 5-year stay of proceedings against a debtor, and permitting the debtor to retain possession of the property under the bankruptcy court's supervision if paying a reasonable rental, etc., held, *inter alia*, to take private property for a wholly public use without just compensation."

It is not enough to pay attention only to the present position arrived at by judicial interpretation in the U.S.A. It has to be remembered that a great deal depends on the composition of the Federal Supreme Court and that guarantees regarding property rights can easily prove inimical to economic progress. In the U.S.A., between 1905 and 1936, the regulation of public utilities and labour experienced many set-backs because of the interpretations placed on the 5th and the 14th Amendments For a long time the setting up by a state of a board authorized to fix minimum-wages for women and minor employees was held unconstitutional. The experience of the early years of the "New Deal" is also instructive. It was only after the change of sentiment in the Supreme Court after 1936 that it was possible to undertake without difficulty labour and social security legislation. All this leads to the conclusion

13 *Ibid.* p. 653-54.

14 *Ibid*, p. 670.

that any detailed regulation of economic activity such as may be required in planned and controlled economy would be rendered almost impossible by the wide right to private property and that of practising business protected by Articels 13 and 24. It is doubtful whether even legislation based on the pattern of the Punjab Land Alienation Acts would be compatible with the maintenance of rights guaranteed under Article 13(1)(f) and (g). Moreover, such regulatory and control provisions as are held constitutional may yet give rise to, perhaps, very large claims to compensation under the wide guarantee given under Article 24. It is in the circumstance incomprehensible why protection to rights of private property and freedom of business should be granted in India in terms much wider than even those guaranteed in the U.S.A. the land, par excellence, of free enterprise.

A specific and widely sustained guarantee of freedom to enter any occupation, profession or practice any business must inevitably make socialistic experiment difficult. The difficulty in the way of individual states will be even greather than in that of the Union. The power of individual states to undertake socialistic experiments or to regulate economic activity will be subject not only to provisions of Articles 13 and 24 but also to those of Article 16. Article 16 protects the freedom of trade, commerce and intercourse throughout the territory of India subject to the power of a state to impose by law such reasonable restrictions on the freedom as may be required in the public interest. In the U.S.A. the power to regulate inter state commerce is wholly reserved by the constitution to the federal government. Therefore, individual states can regulate inter state commerce only to the extent that regulation is held justified under the exercise of police powers. It cannot be said with certainty at this stage what scope will be given to state authority in India under the proviso of Article 244. Many of the fundamental rights protected in Article 13 are subject to the power of the state to make

law in the interests of the general public. In Article 244 this phrase is modified by the qualification that the restrictions imposed in public interests must also be "reasonable." There is general presumption that each specific word or clause has definite significance. The introduction of the term "reasonable" must, therefore, be held to limit the generality of the phrase "in the interests of the public."

In the U.S.A. inter state trading in oleomargarine has been the subject of much judicial interpretation. The limits of the power of a state in this matter have been described as follows.

> "In Schollenberger v. Pennsylvania, however, the court when asked to enforce a state oleomargarine law with reference to the importation and sale in the original package of oleomargarine manufactured in another State, held the law void so far as its application to inter state and foreign commerce was concerned. Oleomargarine, the court held, had been recognized by the Federal Government as a proper subject of inter state commerce, and it was, therefore, beyond the competence of the States whether in the exercise of their police or other powers, to place restrictions upon its importation or exportation. The court, after a review of earlier cases, says: The general rule to be deduced from the decisions of this court is that a lawful article of commerce cannot be wholly excluded from importation into a State from another State where it was manufactured or grown. A State has power to regulate the introduction of any article, including a food product, so as to inusure purity of the article imported, but such police power does not include the total exclusion of an article of food." [15]

Like oleomargarine the trading in *vanspati* may become a matter of legislation in individual states in India. If a state attempted wholly to prohibit the sale of *vanspati* or

15 W Willoughby, *Constitutional Law of the United States*, 1910, vol. i p. 695,

to assume a complete monopoly of manufacture and trading in *vanspati* within its borders would the consequential restrictions imposed upon *vanspati* manufactured in other states be held "reasonable" by the Indian courts?

Constitutional provisions have opposed economic legislation also in the provinces of both Australia and Canada. Section 92 of the Australian constitution which guarantees that intercourse among states shall be free, was held to render invalid certain schemes for the stabilisation of prices which were undertaken by Australian states during the depression. The marketing legislation of some of the provinces of Canada also foundered against the powers of the Dominion Government to regulate trade and commerce. Law courts in the British Empire or in the U.S.A. have generally upheld the power of state governments to lay down conditions governing trading in commodities which were within the scope of police regulations or concerned matters of public health or morality. Doubt has arisen when the regulation affeceted commerce from beyond the boundries of the state and was undertaken in pursuance mainly of economic policy not connected with order, morality, or health. Economic policy may, for example, be directed towards price fixation. When this price fixation affects imports from other states even price fixation may be held invalid.

> "A State law which prohibits the sale of milk imported from another State unless the price paid in that other State to the producer was up to the minimum prescribed by the first State for purchases from local producers, is a direct burden on inter state commerce as to milk sold by the importer in the original cans (as well as to milk sold by the importer in bottles in which it was put after importation)."[16]

Even price fixation may, however, not be enough. In Australia it was found necessary during the depression,

16 *Constitution of the U.S.A.*, op. cit., p. 147-8.

to go much beyond attempts at price regulation and to undertake unified marketing of primary produce. Economic programmes of states in India may go beyond price fixation or marketing pools. Special difficulties are bound to arise when governments of state attempt to create state monopolies or to nationalise any field of economic activity. The implementation of such policy would make it necessary to restrict the freedom of importation and sale within the state area of particular commodities from outside the state. This may offend against either Article 13(1) (f) and (g) or Article 16 or both, and even when considered valid make the state liable to pay heavy compensation under Article 24. The explicit compensation clause may create difficulties even when the power of a state to legislate is not disputed. A state may for example, legislate on the subject of agricultural debt. It is doubtful, however, whether in future it would be possible to bring about a compulsory scaling down of debts, such as that effected by the Bombay Agriculturists Debtors Relief Act, without becoming liable to pay compensation under Article 24.

During the war, Prof. Berreidale Keith noted with interest how much more ready the courts were to safeguard property rights than personal freedom. [17] This tendency was exhibited in the U.K. where there is no constitutional guarantee of fundamental rights. It would be natural for the tendency to be more pronounced where such gurantee exists and is comparatively wide. It is, indeed, surprising that Indian political leaders who talk the loudest about socialisation should frame the guarantees discussed above. The extent of the guarantee in U.S.A. has been indicated above. The guarantee in recent constitutions is limited but the provision regarding property rights was framed with great circumspection even in the constitution of the German commonwealth (1919).

17 See, *Journal of Comparative Legislation and International Law* Vol. xxiii p. 183 and Vol. xxii. p. 211.

"The right of private property is guaranteed by the Constitution. Its nature and limits are defined by law.

Expropriation may be proceeded with only for the benefit of the community and by due process of law. There shall be just compensation in so far as is not otherwise provided by national law. If there is a dispute over the amount of the compensation, there shall be a right of appeal to the ordinary courts, in so far as not otherwise provided by national law. The property of the States, municipalities, and associations of public utility may be taken by the Commonwealth only upon payment of compensation.

Property-rights imply property-duties. Exercise thereof shall at the same time serve the general welfare (Article 153)." [18]

It will be observed how no limitation is placed in these provisions on the overruling power of the government to limit by national law rights of property or to acquire property with or without compensation. Another example may be cited from the recent constitution of Burma. In this constitution the right to private property is subject to the following specific limitation:

"No person shall be permitted to use the right of private property to the detriment of the general public.

Private monopolist organizations, such as cartels, syndicates and trusts formed for the purpose of dictating prices or for monopolizing the market or otherwise calculated to injure the interests of the national economy, are forbidden.

Private property may be limited or expropriated if the public interest so requires but only in accordance with law which shall prescribe in which cases and to what extent the owner shall be compensated." [19]

18 This and the later citations of Articles of the Constitution are from Appendix to R Brunet, op. cit.

19 Quoted by Sir B. N. Rau, '*The Constitution of the Union of Burma*', India Quartely. April-June. 1948. p. 112.

It is inadvisable to maintain provisions relating to the right to private property in the terms in which it is protected in the Draft Constitution. It should be redrafted on the lines indicated by the Weimar constitution. It may be maintained that in view of the section relating to general directions of state policy, etc. judicial interpretation in India may be less rigid than that in U.S.A. or in the Dominions. To run the hazard of judicial interpretation is, however, to take an unnecessary risk. The present wording should be maintained only if it is the real intention to give wider and more secure rights to holders of private property than even those in the U.S.A. If this is not the intention the provisions must be modified as indicated above. It is also necessary, for the reasons stated above to omit the word "reasonable" from Article 24(3).

Not much need be said regarding the contents of Part IV—"Directive Principles of State Policy." It is doubtful whether any real purpose is served by the inclusion of such directive principles in the Constitution of the Union. They have no legal or constitutional force, and once the constitution has been put into operation political parties in power are not likely to be restrained from embarking on any policy because of anything that is contained in the directives. The provisions of the Weimar Constitution, which may be said to have set the fashion of incorporating the general aims of state policy in the law of the constitution had at least the merit of setting forth these aims of state policy in clear terms. Recent constitutions, which follow the practice, such as the Italian constitution also take care to state the principles briefly and categorically. The provisions of Part IV of the Draft Constitution of India are, in comparison, not satisfactorily framed. They are neither properly classified nor put in a logical order, and they do not present, as a whole, either a comprehensive or a significant programme of action. Even individual articles contain an admixture of major and minor issues (see Art. 33). Above all, instead of laying down the principles

or programme explicitly and definitely, the various articles haltingly recount what the state might, within limitations, endeavour. This grave defect is entirely inexcusable in view of Article 29 which makes all the provisions contained in Part IV not enforceable by any court. In one article (Article 36) alone is a definite obligation mentioned. This article commits the state to a provision of free and compulsory enducation for all upto the age of fourteen within ten years and goes to the other extreme of undertaking a definite responsibility which, it is almost certain, the state will be unable to fulfil. The quality of the directives in the Draft Constitution is brought out by the comparison made below of some of these provisions with certain comparable provisions of the new Italian constitution.

Draft Constitution of India	Italian Constitution.
The State shall, within the limits of its economic capacity and development, make effective provision for securing the right to work, to education and to public assistance in case of unemployment, old age, sickness, disablement, and other cases of undeserved want. (Article 32)	Every citizen unable to work and deprived of the means necessary to live has the right to support and to social assistance. Laborers have the right to provisions and assured means adequate to their living requirements in case of accident, sickness, disability and old age, and involuntary unemployment. Those unable to work and the disabled have the right to education and to a beginning in a profession. Organs and institutions established or assimilated by the state provide for the fulfilment of the tasks contemplated in this article. The freedom of private charity is affirmed. (Article 38)

The State shall endeavour to secure, by suitable legislation or economic organisation or in any other way, to all workers, industrial or otherwise, work, a living wage, conditions of work ensuring a decent standard of life and full enjoyment of leisure and social and cultural opportunities. (Article 34)	The worker has the right to a compensation proportionate to the quantity and quality of his labor and in any case sufficient to assure him and his family a free and dignified existence. The maximum length of the work day is established by law. The worker has the right to a weekly rest and to annual paid vacations and may not renounce them. (Article 36)
It shall be the obligation of the State to protect every monument or place or object of artistic or historic interest, declared by parliament by law to be of national importance, from spoliation, destruction, removal, disposal or export, as the case may be, and to preserve and maintain according to law made by parliament all such monuments or places or objects. (Article 39)	The Republic promotes the development of culture and scientific and technical research. It protects the scenic beauty and the historic and artistic patrimony of the nation. (Article 9)

*Cited from Text given in U.S. Department of State: Documents and State Papers, April 1948.

III THE PRESIDENT AND GOVERNORS.

The structure of the Government of the Union follows for the most part the well established pattern of a federal representative democracy. The parliament consists of two houses; the lower house is the directly elected house and the upper is to be composed chiefly of the representatives of states. Legislation can be initiated in either house of parliament. The solution provided for deadlocks is a joint sitting of both the houses of parliament. The strength of the lower house will be double that of the upper house and it will, to that extent, exercise greater pull in the way out of deadlocks. The lower house has special power of initiation and passing money bills. The form of the executive is that of a cabinet responsible to the parliament.

The provision in the main structure of the constitution which is likely to prove the most contentious is regarding the position and powers of the President. The executive power of the Union is vested in the President and the council of ministers with the Prime Minister at the head is to aid and advise the President in the exercise of his functions. The supreme command of the defence forces shall vest in the President and he shall have special powers to grant pardon, reprieves, etc. All executive action of the government shall be expressed to be taken in the name of the President. This form of expressing the unity of executive power is not necessarily incompatable with the proper working of a system of cabinet rule. In many republican constitutions the command of defence forces is vested in the President and all executive action taken in his name. However, this is usually qualified by some provision which makes clear the status of the President as a constitutional head of government. For example, the constitution of Irland (Eire) lays down that "the power and function conferred on the President by the constitution shall be exercisable and performable by him only on the advice of

the government, save where it is provided by this constitution that he shall act in his absolute discretion or after consultation with or in relation to the Council of State," and that "no power or function conferred on the President by law shall be exercisable or performable by him save only on the advice of government." (Section 13 Sub-Sections 9 and 11.) Provisions on the model of the following Section of the British North America Act make clear the position of the Governor-General as the constitutional head in the constitution of all the Dominions.

> "The Provisions of this Act referring to the Governor-General in-Council shall be construed as referring to the Governor-General acting by and with the Advice of the Queen's Privy Council for Canada." (Section 13) [1]

In the alternative some constitutions provide that all acts of the President shall require to be countersigned by a responsible minister. Such was the provision contained not only in the constitution of the Third Republic of France, but also in that of the Weimar Republic under whose constitution the President exercised many special powers.

Similar provisions are to be found in the constitution of the Italian Republic (1947). No such provision is to be found in the Draft Constitution of India. It is not clear whether the omission is deliberate. If deliberate it is likely to lead to grave conflicts, in case of a difference of opinion arising between the President and his council of ministers or the party in power in the lower house.

In the constitution of the executive of states also no clear direction regarding the exercise of power by the

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1 After the Statute of Westminster the provision was applied explicitly even to the Crown in South Africa.

"Save, where otherwise expressly stated or necessarily implied any reference in the South Africa Act and in this Act to the King shall be deemed to be a reference to the King acting on the advice of his Ministers of State for the Union. Status of the Union Act." Section 4 (3).

2 "All orders and directions of the National President, including those concerning the armed forces, require for their validity the countersignature of the National Chancellor or of the appropriate National Minister. By the countersignature responsibility is assumed." Article 50.

Governor has been incorporated in the constitution itself. The following provision is however, made in paragraph 3 of the 4th Schedule which lays upon the Governor the obligation to be guided by the advice of his minister.

> "In all matters within the scope of the executive power of the State, save in relation to functions which he is required by or under this Constitution to exercise in his discretion, the Governor shall, in the exercise of the powers conferred upon him, be guided by the advice of his ministers."

It is essential, for the proper working of a cabinet government that this explicit declaration regarding the exercise of his power by the Governor is laid down as a constitutional provision incorporated in the Act and not stated merely in a schedule of instructions to the Governor. A similar constitutional provision should be made in relation to the powers and functions of the President also.

Among the specific powers of the President are his right to send messages to or to address any house of parliament. This power is not unusual. The provision regarding assent to bills in the Draft Constitution is, however, of an unusual nature and vests very large powers amounting practically to a power of veto in the President. The provision is as follows:

> "When a Bill has been passed by the Houses of Parliament, it shall be presented to the President, and the President shall declare either that he assents to the Bill, or that he withholds assent therefrom:
>
> Provided that the President may, not later than six weeks after the presentation to him of a Bill for assent, return the Bill if it is not a Money Bill to the Houses with a message requesting that they will reconsider the Bill or any specified provision thereof, and, in particular, will consider the desirability of introducing any such amendments as he may recommend in his message, and the Houses shall reconsider the Bill accordingly." (Article 91)

In other constitutions the formal assent of the President to all legislation is required, but it is unusual to lay down that the President can withhold his assent therefrom.The constitution of Eire lays down that the President shall sign every bill presented to him for his signature and for promul-

gation by him as a law within given time limits and gives him no powers of returning it to the legislature for reconsideration. (Section 25). In constitutions where certain delaying powers are given to the President a definite limit is always laid on such powers. Articles 73 and 74 of the Constitution of the Italian Republic exemplify such provisions:

> "The laws are promulgated by the President of the Republic within one month of their approval.
>
> If the Chambers, each by an absolute majority of its own members, declare the urgency of a law, it is promulgated within the time which that law itself establishes.
>
> The laws are published immediately after promulgation and take effect on the fifteenth day following publication, except when the laws themselves establish a different period.
>
> The President of the Republic, before promulgating a law, may by means of a message stating the reasons request a new decision of the Chambers.
>
> If the Chambers again approve a law, it must be promulgated."

Similar provisions are to be found in the latest Constitution of the French Republic. It is essential, in order to avoid conflict, to rephrase Article 91 of the Draft Constitution so as to leave no more power with the President than that of making parliament reconsider a law that has been adopted.

The President of the U.S.A. is the chief executive and not merely a constitutional head. Even so his powers of vetoing bills is restricted. A bill confirmed by a two-thirds majority of each house makes the President's veto inoperative.

It is likely that the wording of Article 91 reveals the influence of the Act of 1935 and of the provisions in Dominion constitutions. The Act of 1935 was in a class by itself and its provisions have no relevance to the constitution of a

sovereign republic. The constitutions of the Dominions mention withholding of assent to a bill by the Crown. However, this power is now obsolete. The Imperial Council of 1930 approved the abolition of disallowance and reservation of assent by the Crown, if the step was desired by any Dominion. The Union of South Africa and the Irish Free State acted on this, but even in the Dominions which have not so acted the process of reservation and the refusal absolutely of assent may now be considered completely obsolete. In no constitution is the constitutional head given the power of legislative veto and there is obviously no justification for imitating the obsolete phrasing of the constitutions of the Dominions in the Constitution of the Indian Union.

It has been usually agreed that a President who is to function no more than as the constitutional head should be elected by the houses of legislature. The provision regarding the election of the President in the Draft Constitution of India appears unnecessarily elaborate. The election is to be by members of the Union Parliament and by elected members of the legislatures of states. It has been provided that the weight attached to each vote cast by a member of the legislature of a state shall be strictly proportionate to the numbers of population that he is presumed to represent. This means that the weightage of votes given to members of legislatures of states will be distributed in the same proportion in which the population of these states is represented in the house of the people of the Union. In this event no purpose is served by elaborating the method of election of President in the manner described in the Draft Constitution. The simplest course would be, that usually followed, of electing the President by vote of all members of both houses of the Union parliament taken together. The method of election of the Vice-President suggested in the Draft Constitution (Article 55) may, therefore, fully suit the election of the President.

The provisions relating to Governors are similar in most respects, to those relating to the President. There are, however, some significant differences. While Article 62 lays down that the Prime Minister of the Union shall be appointed by the President and the other ministers appointed by the President on the advice of the Prime Minister, Article 143 relating to governments of states does not seem to require the Governor to appoint the other ministers on the advice of the Chief minister.

In this connection comment may be offered on the peculiar position of the fourth schedule in the Draft Constitution. The insertion of the fourth schedule seems to be an unnecessary imitation of the provisions of the Act of 1935. In that act such a schedule of instructions was not out of place because the instructions purported to emanate from a higher constitutional authority. In relation to the act of the constitution of the Indian Union there is no such external source of overriding power. There are three effective provisions contained in this fourth schedule. The instruction contained in paragraph 2 of this schedule replaces a provision of Section 63(1) and (3) as applied to the Union cabinet. Instead of naming the chief minister directly the instructions refer to him as the person who in the Governor's judgement is "most likely to command a stable majority in the legislature;" this is an unnecessary piece of euphemism. The instruction further goes on to refer to "important minority communities." The reference can obviously create no constitutional guarantee. Lastly, it lays down that in forming his cabinet the Governor "shall bear constantly in mind the need for fostering a sense of joint responsibility among the ministers." This is a poor substitute for Article 63(1) which lays down squarely the doctrine of joint responsibility as regards the Union cabinet. The third paragraph of fourth schedule, already referred to above, contains an important constitutional provision which should definitely form a part of the law of the constitution itself. The fourth paragraph, on the other

hand, gives a general directive which neither enhances the power of the Governor nor makes any constitutional provision for smoother or more efficient government. The device of instructions whose constitutional force is carefully taken away, by Article 144, Clause 4, is both clumsy and valueless. The operative part included in the instructions should become a part of the constitution. The other directions are best omitted altogether. They merely express pious platitudes which every body in principle accepts but which, having no legal force, are bound to be ignored at any crisis in the rough and tumble of party politics. [3]

The insertion of a schedule of instructions would be justifiable in the Constitution of the Indian Union only on the supposition that governments of the states of the Union were subordinate authorities and that the Governors acted under the direction of and bore special responsibility to the President of the Union. Such a supposition would be destructive of the whole basis of the Constitution of the Union.

A bill passed by the legislature of a state has to be presented to the Governor and he may either assent to it or withhold his assent therefrom, or reserve the bill for the consideration of the President (Articles 175-176). The provision for withholding assent by the Governor is on lines of the similar provision in case of federal legislation. No additional comment is necessary in that regard. The power to withhold assent absolutely must not be vested in the Governor and all that need be provided is to enable him, as suggested above in the case of the President, to bring about a reconsideration of the bill by the legislature. The power to reserve a bill for the assent of the President, however, deserves special consideration.

3 The Instructions have long become obsolete in the Self-Governing Dominions. This new relationship between the Governor-General and the Canadian cabinet has left a number of constitutional provisions in the air without any logical support. It has for example caused one part of the prerogative instruments, the Instructions, to become not only an anachronism but an absurdity". R. M. Dawson, *The Government of Canada*, 1947, p. 174.

The provisions of Articles 175 and 176 of the Draft constitution are another instance of blind imitation of the provisions of the 1935 Act. In the 1935 Act the power of the Governor to reserve a bill for the assent of the Governor-General and of the Governor-General to resevrve it for the assent of the Crown was logical. It arose from the constitutional structure of the British Empire. The sections merely affirmed the power of the Crown, recognized in all Dominion constitutions, to disallow an act passed by the local parliament and secondly the fact that the Indian constitution set up by the 1935 Act was not that of a fully independent federation. Under the 1935 Act the Governor-General was the representative of the Crown who had a number of special responsiblities flowing out of many peculiar constitutional provisions of the Act. Provisions appropriate to the position of the Governor-General of India are not appropriate to that of the President of the Indian Union. Legislative acts of the state legislatures can deal only with subjects which fall within the purview of the state. In case they overrun their bounds the Supreme Court can rule the laws unconstitutional. The head of the Union has no place in this legislative process. The legislative authority of the state legislature does not ultimately derive from the President nor has he any special responsibilities in regard to state affairs. There is no particular sphere in future state legislation, as there was in 1935, where a higher authority could intervene. There would, in the circumstances be available even no guidance to the Governor as to which legislation would or should be reserved for Presidential assent. The concept of reservation of state legislation for the assent of the constitutional head of the federation is wholly opposed to the autonomy, within a defined sphere, of the state and its legislature.

There is, another additional point relating to the office of Governor which requires consideration. The original provision of the Constituent Assembly was that the Governor of a state should be elected by the direct vote of all persons

who had a right to vote. A direct election is unnecessary for filling the post of a constitutional head and members of the Drafting Committee who consider that the co-existence of a Governor elected by the people and a Prime Minister responsible to the legislature might lead to friction and consequent weakness in administration are, no doubt, in the right. But the alternative that the Drafting Committee has suggested appears even less justifiable. The Committee suggests the election by the legislature of the state of a panel of four from among whom the President would appoint one as Governor. No reason is adduced by the Drafting Committee for the intrusion of the President in a matter which is purely domestic to the state. The Governor of a state represents the state in all ceremonial and other functions and is its constitutional head. He should, at least at the time of taking office, be assured of the confidence of the bulk of the people of the state. A Governor elected by all people would obviously have such title to confidence. The resort to direct election is, however, unnecessarily cumbrous and would invest the office of President and his person with more political power than would suit the circumstances. If, instead of the direct election, the usual way, that of electing the constitutional head, by the legislature itself is taken, both purposes will be served. It will then be broadly assured that the Governor enjoys the confidence of atleast a majority and a conflict between the party in power in the legislature and the Governor will also be avoided. A Governor who is initially elected by the legislature will not be in a position to interfere actively with the ministery even if the balance of power in the legislature becomes, in time, different from that at the time of his election.

The suggestion made by the Drafting Committee has two pronounced demerits. In the first instance in a panel of four elected on the system of proportional representation one or more names commanding only a small minority of support in the state may become included. It is unde-

sirable that the Governor should be one who so obviously enjoys confidence of only a minority. Secondly, the suggested procudure introduces into state politics the President of the Union. This might lead to a grave infringement of the autonomy of the state; it might also result in the lowering of the dignity of the office of President by mixing him up with what might be issues of party politics in the government of a state. In considering the provision relating the Presidents and Governors it must be constantly borne in mind that the incumbent of these offices will, in the large majority of cases be elderly party politicians with a definite political past. They will not enjoy the advantage enjoyed by Governor-Generals or Governors appointed in the past by the Crown in the British Dominion. The provision of appointing a Governor by a President will necessarily work on party lines and will lead to a very difficult position, especially when the party allegiance of the President of the Union and the majority of a legislature in a state are different.

In recent years even the appointment of Governor-Generals and Governors in the Dominions has been made by theCrown more and more on the recommendation of the governments in power. The Governor-General in the Dominions is now appointed by the Crown on the advice of the cabinet of a Dominion. By slow transition the appointment has now come to be that of a local politician. The complete changeover was exemplified in the appointment of Mr. Mackell who was the Labour Premier in New South Wales since 1945 as the Governor-General of Australia in 1947. In the Dominions, therefore, the virtual position is that the Governor-General is a nominee of the party in power, for the time being, in the Dominion. His standing and political position is, therefore, similar to a Governor-General who had been elected by the legislature. The Governors of the states in Australia are also appointed after first ascertaining that the nominees of the Imperial

Government will be welcomed locally and the tendency has become marked to have Governors appointed who are nominees of the state cabinet just as the Governor-General is a nominee of the Dominion cabinet.

The discussion may be summed up as follows: The President must clearly be a purely constitutional head of government enjoying no special powers other than those ordinarily enjoyed by such a head. This position of the President must be made clear by a provision in the constitution laying down either that the President shall in all matters act on the advice of his council of ministers or that every act of the President shall require the countersignature of a minister. Secondly, the President's power to withhold assent from Union legislation must be limited. It should merely enable him to require reconsideration of any legislative measure by parliament. In view of the adjustment of the provisions regarding the President in this manner the election of the President may also best take place by and through the parliament, without bringing in it, members of the legislatures of states. The provision regarding the election of the Governor should also be simple; he should be elected by the member of the State legislature (of both houses if there are two) in accordance with the system of proportional representation by means of the single transferable vote. The wide powers at present vested in the Governor in relation to assent to state legislation should be modified on the lines suggested above for Presidential powers. The statement now contained in the schedule of instructions to the Governor regarding every action of the Governor other than that taken at his own personal discretion being on the advice of the minister should be incorporated in the act and made a full constitutional provision; and the schedule should be removed from the act of the constitution.

IV. SECOND CHAMBERS.

Article 67 provides for the constitution of the Council of States. The total number of members of the Council of States has been fixed at 250. Of these 15 are to be nominated by the President and the rest to be elected by the states. The manner in which representatives of the states will be divided between different states is not indicated in the Draft Constitution. The only provision regarding the distribution of representatives is that the representatives of states in Part III of the first schedule shall not exceed 40 per cent of 235. It may be that the detailed provision regarding distribution of representation was not made in view of the uncertainty of the final form of units in Part III. As long as this uncertainty persists it may be difficult to make the final distribution of representation.

In a federation, the second chamber is held usually to be the guardian of the interests of the states as such and the name given to the second chamber in the Draft Constitution —the Council of States—would indicate an intention on the part of the framers of the constitution that it should act in this manner. The lower house which in most representative democracies, elected by a direct vote of the people contains representatives of the various states in proportion to their population. In a federation where the size of the units varies to a wide extent one or few populous states may, in the event, be found to dominate the lower house. It is usually considered desirable to avoid such dominance. In the Council of States, therefore, either the same number of representatives is allotted to each state irrespective of size a minimum number of representatives is allotted to each state however small its population may be and the number of representatives of the larger states is not increased directly in proportion to the size in their population. The number of units of the Indian States, i.e. of states in Part III was large at their initial accession in August 1947. If each of these units had received a minimum number of repre-

sentatives and the scale of representation for the rest had followed usual lines, the number of representatives of states in Part III might have reached a disproportionately high figure. Most probably, it was this consideration that led to the inclusion of the proviso limiting the representatives of states in Part III in the Council of States to a maximum of 40 per cent. Such a limit does not, however, solve any of the difficulties inherent in the situation. That the need to place this limit was felt, itself raises questions regarding the methods adopted during the last year to form the unions of states.

In the formation of the unions of states sufficient attention does not seem to have been paid to the minimum size necessary for a federating unit. Once the principle of the territorial integrity of individual states had been given up and the identity of states permitted to be lost in a union, large or small, no consideration except that of homogeneity and of the appropriate size for a federating unit should have determined the scope of each union of states. The unions of states formed at present seem not to have been governed by these criteria and are unncessarily small. Also, in certain instances comparatively small individual states have been allowed to exist. As a result the disparity in average size between states in Part I and Part III will persist even after many states have been joined together in unions.

Another difficulty in the attainment of a reasonable size for units seems to be the unwillingness to embark upon the experiment of forming together (except by way of complete merger) composite federating units out of territerritories of the old Indian States and British Provinces. The effort at the formation of rational federating units of a reasonable size will not be achieved until the independent existence of small states is no longer tolerated and the older distinction between state and provincial territory is not allowed to stand in the way of the proper formation of these units. As long as this does not happen

the problem of the composition of the Council of States will remain difficult.

However, even in case federating units are not rationally formed till the inception of the constitution, this should not prevent detailed provision being made for the composition of the Council of States. As the Draft Constitution stands the composition is not defined in detail. It is also not indicated how this definition will be made at any stage in the future. Such non-provision is without precedent. It is obviously essential that the principle on which the representation of states in the Council of States will rest, should be incorporated in the Constitution itself. The principle that in the Council of States the smaller states have weighted representation must, of course, be indicated directly or indirectly in the constitution. If the large number of units of states in Part III prove a hindrance in a reasonable redistribution of representation, the arrangements for the states in the two parts —Part I and PartIII—must be separately made. It would then be best to lay down that representation of states in Part I as a whole and of states in Part III as a whole would be in proportion to the respective total populations of the units in the two parts. No weightage would thus attach to the group of units in either parts. The distribution of the proportion of share of representations in each part should, however, be effected in accordance with the principle of weightage to small units. There would be no difficulty in this case in defining separate scales of representation per unit in Parts I and III and in determining immediately the scale as far as states in Part I are concerned.

As long as fundamental distinctions are maintained in the treatment given to units in Part I and III the arrangement indicated above is the only feasible. States in Part III, at present, have a differential status and may not accede in regard to the full list of central subjects. There is, therefore, no reason why this set of federating units

be allowed more than a proportionate share in representation in the Council of States. In the ultimate analysis, the centre of political power in the Indian Union will rest in the large central block of the speakers of Hindi-Hindustani. It is the states on the periphery of this block and especially those in Peninsular India that will be found to have a point of view which needs to be specially represented in the Council of States. It happens at present that states in Part III are not found in large numbers in this block. A weighted representation given to these states would, therefore, defeat the normal purpose of the federal second chamber.

The units of Indian State territory are historical remnants, the importance of whose separate existence should vanish quickly. Ultimately, the federating units should be formed on the basis primarily of political homogeneity and secondarily of administrative convenience. The reformation of provinces on the basis of linguistic homogeneity is a step in the right direction from this point of view. Another such step has been the formation of union of states. No praise can be too high for the manner in which the Ministry of States has worked during the last years for the solution of the problem of states. Political circumstances rendered it necessary that the accession of the states to the Union should be formally completed within a very short space of time. There was, therefore, no scope initially to tackle the question of constitutional status or to bring order into the number and disposition of the State units. However, the Ministry of States set to work upon the problems immediately after the completion of formal accessions; and it has already achieved signal successes in every direction. Within the year, one of the greatest obstacles in the way of the political progress of India—the claim to territorial integrity and the political privileges of dynastic rulers has been removed. The territories of many states have been merged with the territories of the province; and the territories which have not been so merged

have, in the large majority of instances, been formed into unions. These unions are not, as it had been once suggested they would be, federations in themselves but completely integrated and single administrative units. Also in forming these unions some regard has been paid to the principle of contiguity and political homogeneity. No multilingual unions have, for example, been formed. The revolution in the constitutional sphere is equally great. Nothing opposes any longer the adoption of the full form of representative democracy by governments in any of the states or unions of states.

Two steps however, remain to be taken before a proper system of federating units can emerge in its final form. Firstly, the constitutional status of the states and the provinces must become the same. The need for this and the steps by which it may be achieved have been indicated above. Secondly, the units of states and states' unions need to be further enlarged with reference to the principles of political homogeneity, the attainment of a minimum size per unit and also with reference to the desirability of bringing about the union of large masses of people linked together with a common political sentiment. The formation of unions of states has greatly improved upon the pre-existing situation. Even so the unions have been more numerous than they need or should finally be, especially in the area of the Rajputana and Central Indian States. In the other areas they have, perhaps, been made as large as they could be made, so long as they consisted only of the older states' territory. The inistence on so confining the unit is no longer required by any political circumstance. Also, it must be given up, if the end desired by large masses of people of a large unified political whole of their own, is to be attained. The political unification of the speakers of Gujarati requires the coming together of Saurashtra with the districts of Gujarat. Mysore and Travancore must similarly join in a political union with the other units of speakers of Kannada and Malayalam to

form a proper Karnataka and Kerala. Before such integrated composite units are formed it is necessary that both types of units have the same constitutional status. It may also become necessary to provide for the creation by a state of a sub-state and of sub-state authorities. Such possibility may facilitate the process of joining together these two types of units.

The possibility or rather the necessity of the formation of such units has also relevance to a consideration of the distribution of seats in the Council of States. The total number of seats in the Council of States has been fixed. Their distribution has not been indicated. It has been argued above that so long as there is a distinct group of states with a special status, as states in Part III, the same scales of representation should not apply to both the parts but that the total number of elected representatives should be divided in proportion to the population of the two groups of states and the proportionate share should be allotted to each part and that after this allotment an appropriate scale be devised for each part. This set of proposals would fully meet the situation if the situation at the establishment of the Union was considered to have fully evolved, i.e. if no change in the number and composition of the federating states was subsequently expected or hoped for. It has, however, been contended above that this is far from being the case. The situation of today exhibits a transitional phase. The changes necessary for reaching the stable equilibrium in the matter are numerous and large. These changes may affect representation in the Council of States in two ways. In the first instance, the total number of representatives of the re-formed units according to a scale which is not made exactly proportionate to population would not necessarily be the same as the total number of representatives of the units out of which the new units are formed. Secondly, the total number of representatives of a new unit formed by the joining together of two or more old units may be less than the total number obtained

by them before the joining. The possibility of such a diminution of representation in the Council of States may result in the creation of some opposition to the joining together.

The first difficulty arises because the number of total members of the Council of States is fixed by the Draft Constitution. The fixation of this number in the constitution is not necessary. In fact, it is unusual to fix this number in a federal constitution. Ordinarily federal constitutions fix scales of representation for states and do not indicate or fix the total number of the members of the second chamber. This procedure may be followed in India. The scale of representation today may be so fixed as to lead to the desired number under existing conditions. The variation in total representation brought about even by the changes indicated above will not be large. The second difficulty cannot be as easily met. The only way way of meeting it would be perhaps to provide that no change would be brought in the total representation accruing to any set of units according to scales fixed at the inception of the constitution because of the re-formation of any units. The operation of such a rule would be easy when a unit is formed by simple amalgamation of two or more old units. When the formation of new units involves the break-up of an older unit some reappropriation of representation will be necessary. This may be effected by an act of parliament. Such a provision will also get over the first difficulty; because, with its operation no change in total representation could come about on account of fusion or redistribution. The adoption of this point of view would also enable the Constituent Assembly to proceed to the determination of the fixed number of representatives of each unit in each part as soon as the number and composition of the units to be named in the constitution is finally fixed. It may be apprehended that the adoption of this principle may encourage fissiparous tendencies, i.e. would encourage some units which would otherwise have

come together to remain separate at the inception of the Union to obtain greater total representation. This apprehension seems, however, far fetched. Also if in any particular case such calculations appear to be influencing decisions, the Constituent Assembly could make clear that it would not give weightage to small units when their separate existence was not considered reasonable or desirable by the Assembly.

To sum up. The gap in the Draft Constitution regarding the distribution of seats in the Council of States must be filled. The details of the composition of the Conucil of States on the basis of the units finally named in different parts of the first schedule must be fixed in the act of the constitution. In view of the difference of status between states in Parts I and III the total of elected seats, excluding the small number reserved for states in Parts II and IV, should be divided between the two parts according to the proportion of the numbers in the population contained in the states of the two parts. The seats allotted in this manner for each part should be distributed among the states in each part on the principle of giving weightage to the smaller units. In view of the transitional character of many units it should be provided that the formation of new units or new states should not lead to a change in total representation or its allocation and that the total number of representatives of the new states should be made up by the reappropriation by parliament of the old number among the new units. If some entirely new units join the Union the number of their representatives would in future be determined by parliament. From this point of view also it seems undesirable to lay down a fixed number of members for the Council of States.

One feature of the composition of the Council of States is the existence within it of a nominated element. Fifteen members of the Council are to be nominated by the President. If the Council of State is essentially a

body of representatives of the states of the Union qua states, the introduction of the nominated element in this body is distinctly out of place. There are some federal second chambers which are composed of persons nominated by the constitutional head. For example, the Senate of the Dominion of Canada consists of persons nominated by the Governor-General. However, the persons nominated are nominated to represent certain states or regions and they are all so nominated. The principle of homogeneity in the formation of the Senate is, therefore, maintained intact. The fifteen persons to be nominated by the President of the Indian Union are to be persons having special knowledge of or experience in respect of certain named matters, and as the named matters cover almost the whole field of human activity the representation is completely unspecified and general. There seems no justification whatsoever for the instrusion of such a nominated element in the house which is supposed to represent states.

The number of nominated members is not large but even the small number of 15 is large enough to tilt the balance in times of a political crisis. The political function of the Council of States is specially important in a federation like that of the Indian Union. Its composition should, therefore, not leave room for possible grounds of complaints. The presence of members nominated by the President in the Council of States may lead to the power of nomination being used for particular party or for political purposes. It is the experience in all countries that however much the framers of a constitution talk of nomination on grounds of eminence or special knowledge the actual result is a provision for party politicians. In a house of which the vast majority consists of the elected representatives of states the small nominated element could not prove of much use even if the nominations were rightly made. On the other hand, the provision may lead to attempts at manipulation or at least, constant suspicions that manipulation

was attempted. The provision should, therefore, be removed.

Another provision regarding the Council of States deserves notice. This is the provision of Article 53 that the Vice-President shall be ex-officio chairman of the Council of States. This is a surprising provision. It runs counter, in the first instance, to the principle of autonomy of every house of legislature. Each house of legislature ought to have the fullest liberty to elect its own chairman. The Vice-President is to be elected not by the Council of States but by two houses of parliament voting together. It is distinctly wrong that a person elected by an electorate in which members of the Council of States constitute only a minority should be the chairman of the Council of State. Moreover, there appears no justification for making the Vice-President chairman of the Council of States. He would in no special manner represent the states or function as a guardian of their interests. The chairmanship of a house of legislature again requires certain special qualities and qualifications and there is no guarantee that the Vice-President, who again is likely to be an elderly party politician would adequately fulfil this office. The second chamber in the Union, especially if it functions effectively as the protector of the state rights, may well be a busy legislative chamber. There appears no justification for making the Vice-President an ex-officio chairman of the Council of States and this provision should not be retained in the constitution.

It is, indeed, doubtful whether there is any real need for the office of Vice-President. It is not usual to have such an office. The provisions of the Draft Constitution regarding creation of the office of Vice-President and making the Vice-President chairman of the second chamber, appear to have been copied from the Constitution of the U.S.A. The following long extracts will make clear how the office arose in the U.S.A. and acquired its present functions:

"The term Vice-President was probably suggested to the Convention by the fact that at the time the Constitution was adopted, in several of the States the officer now called Lieutenant-Governor was called Vice-President, and succeeded to the Governorship in case of a vacancy. He presided over the deliberations of the Senate in those States. The office is unique in our constitutional history. In case of a vacancy in the office the Constitution makes no provision for filling it. In no other country is there any office corresponding to that of Vice-President under our Constitution.

"The report of the Committee of Detail authorized the Senate to choose its President, and this was adopted by the Convention without objection. The Convention also adopted a provision that in case of the removal, death, resignation or disability of the President, the President of the Senate should discharge the duties of the President. At a very late day in the Convention the Committee of Eleven reported in favour of a Vice-President, and that he should be ex-officio President of the Senate, and defined his duties. He was to preside over the Senate, and was to be elected like the President, by the electors of the respective States, but if two or more candidates had equal votes then the Senate should elect the Vice-President from among the candidates. There was objection to the Vice-President presiding in the Senate, and it was urged that such officer was not only not necessary but might be hazardous. It was also urged that it was contrary to the ordinary course of legislative proceedings to have an officer preside over a body who was not a member of it, and that the State from which the Vice-President would come would have more votes than any other State. Mr. Hamilton commenting on this subject, said: 'The appointment of an extraordinary person as Vice-President has been ob-

jected to as superfluous if not mischievous; it has been alleged that it would have been preferable to have authorized the Senate to elect one of their own body a presiding officer answering to that description. Two considerations seem to justify the ideas of the Convention in this respect. One is that, to secure at all times the possibility of a definite resolution of the body, it is necessary that the President should have only a casting vote. And to take the Senator of any State from his seat as Senator to place him in that of President of the Senate, would be to exchange, in regard to the State from which he came, a constant for a contingent vote. The other consideration is that, as the Vice-President may occasionally become a substitute for the President in the supreme executive magistracy, all the reasons which recommend the mode of election prescribed for the one apply with great, if not with equal, force to the manner of appointing the other.'

Story says: 'A strong reason for the Vice-President being President of the Senate was based upon the jealousy and equality of the States in the Senate. Again if the presiding officer of the Senate should be chosen from that body the State from whence he came might exercise more or less of its share of influence. In case of the presiding officer was not allowed to vote unless there was an equal number voting on opposite sides independent of his vote, his State might lose one of its votes, while if he were allowed to vote as Senator and also to cast a deciding vote as presiding officer, then his State might have a double vote. Either event would present an embarrassing situation. But if no casting vote should be allowed, then the whole public might suffer in case of an equal division of votes. In such a case the Vice-President as presiding officer would appear to be an appropriate officer to decide, being the representative of all the States, and

not of any particular one. The only instance in which the Vice-President could have a vote was when there was an equal number of votes for or against a given question, when he would have the deciding vote.[1] "

"Although the Vice-President presides over the Senate he is not selected from the Senators, or by them. He has but little power in the administration of Government affairs; he does not, like the speaker of the House of Representatives appoint any committees, the Senate having established the practice of appointing its own committees. Could the Vice-President exercise this function it would make him one of the most powerful officers in the government. When the office of Vice-President becomes vacant, the President of the Senate *pro tempore* discharges his duties except voting in case of a tie. He would be prevented from doing this because his election as President *pro tempore* has not deprived him of his vote as Senator and he could not vote as Senator and also as presiding officer of the Senate, for this would give him two votes to every other Senator's one. President Roosevelt, in his *American Ideals* says, 'The Vive-President is an officer unique in his character and functions, or to speak more properly, in his want of functions while he remains Vice-President, and in his possibility of at any moment ceasing to be a functionless official and becoming the head of the whole nation. There is no corresponding position in any Constitutional Government. Perhaps the nearest analogue is the heir apparent in a monarchy. Neither the French President nor the British Prime Minister has a substitute ready at any moment to take his place, but exercising scarcely any authority until his place is taken.' " [2]

1 Watson, *The Constitution of the United States, Its History, Application and Construction*, 1918. Vol. I, p. 250-252.

2 *Ibid.* p. 253.

It will appear from the above that the main reason why the Vice-President, though an outsider, was made President of the Senate was the desire to avoid the representation of any particular state carrying more or less than the allotted weight. In the Senate of the U.S.A. each state is represented by two Senators. In this circumstance, the elevation of a Senator to the chair would affect to a large degree the representation of the particular state. In India the number of representatives of many states would be considerably larger than two. The particular reason would, therefore, have little force. Also, because the Vice-President is an outsider the President of the U.S.A. Senate has been deprived of the usual powers given to the chairman. This is undesirable and the election of a member of the house as President must be made to avoid it.

The President of the U.S.A is not only the Head of the state but is also the Supreme Executive. It may, therefore, be desirable to provide him constantly with an understudy who could, at a moment's notice, step in his place. In India, the President would be merely a constitutional head. In many other constitutions provision is usually made for a temporary or sudden vacancy in the office of the President by laying down that, in such an event, the President of the federal second chamber should act as President. Similar provision can be incorporated in the Constitution of India and it would then be unnecessary to create an office which has no real function or even *raison d'etre,* especially in a system of cabinet government. None of the special circumstances which led to the creation of the office in U.S.A. are present in India and it appears unnecessary for us to imitate in this respect the Constitution of the U.S.A.

Provision has also been made for second chambers in states (Article 148). A footnote to this provision says that names of states which are to have two houses "will be filled in when it has been ascertained which of the states are to have two Houses." It is not indicated how this will be "ascertained" and whether the peoples of the states

concerned will be given any effective voice in the determination of this important matter. It is to be hoped that this matter will not be decided according to the wishes of the members of the Constituent Assembly representing each state. It would be best if the Draft Constitution does no more than provide enabling powers by which the people of any state can have a second chamber if they so desire. It is not common to have a second chamber in the constitution of the primary units in a federation and where they exist, such as in Australia, they have proved more a hindrance than a help and moves are constantly being made to abolish them. It would, on this account, be extremely unfortunate if any state were at this stage saddled with a second chamber without the people having been given due opportunity to express a definitive opinion on the question. The problem of the formation of second chambers has always proved difficult and the particular proposal made by the Drafting Committee for second chambers of states cannot be considered satisfactory. It is to be a composite Council half of whose members will be elected from five panels of names. The panels will contain names of representatives of universities and of persons having "special knowledge or practical experience" in respect of named subjects of wide scope grouped into four sections. This is not functionalism by any means nor does it provide for the inclusion of experts. The description of subjects by the Draft Constitution would enable almost any person in active life or retired, to be included in the panel. The composition of the house would, therefore, depend in the main on the authority preparing the panels. There is little doubt that if this type of second chamber came into existence in any state it will, as in many other countries, be no more than the refuge of ex-politicians and others whom the political parties in power desire to reward suitably. Second chambers in Indian Provinces have not proved successful and on a balance of considerations it would be best for the states to do without second chambers.

V RELATION BETWEEN UNION AND STATES.

The first resolution of the Constituent Assembly of India defined the status of the federating units in the following manner:

> "Wherein the said territories, whether with their present boundaries or with such others as may be determined by the Constituent Assembly and thereafter according to the Law of the Constitution, shall possess and retain the status of autonomous Units, together with residuary powers, and exercise all powers and functions of government and administration, save and except such powers and functions as are vested in or assigned to the Union, or as are inherent or implied in the Union or resulting therefrom."

The reference to residuary powers in this resolution may now be considered obsolete. It was obviously made as concession to the demands of the Muslim League. In the changed political context residuary powers must be transferred to the Government of the Union and the Draft Constitution provides for this.

One of the most important aspects of a federation is the division of powers between the federation and the states. The Draft Constitution follows closely the division laid down by the 1935 Act as between the centre and the provinces. Where there is any deviation from this division it is almost invariably in the direction of strengthening the Government of the Union. There are certain new entries in List I, the Union list, e.g. industries declared by parliament by law to be necessary for the purpose of defence or for the prosecution of war; interstate trade and commerce; development of interstate waterways; provision for dealing with grave emergency in any part of the Union. The Drafting Committee has also considered it desirable to put in the Concurrent List all matters in repect of which parties are now governed by their personal law as also land acquisition for purposes of the Union and the states. These

emendations of the lists all aim at better coordination and greater uniformity; they do not seriously affect the main pattern of the division of powers, which is that of the 1935 Act. The division vests the government of the Union with comparatively large powers and should make it strong. This strength is required in existing circumstances; on the other hand, the scope of state jurisdiction could not well be smaller in a federation with the area and diversity of conditions of the Indian Union.

Attention may also be drawn to the proposal of the Drafting Committee to give, for a period of five years after the commencement of the Constitution, certain powers to the Union Parliament. It is provided in Part XVII (Temporary and Transitional Provisions.) that trade and commerce in, and the production supply and distribution of, certain essential commodities as also the relief and rehabilitation of displaced persons shall be on the same footing as Concurrent List subjects. These, especially the former group of powers, are wide and give, in effect, complete control over economic activity to the government of the Union. It may be necessary for the Union to possess and exercise these powers during the period required for the new order to settle down. It should, however, be noted that they place the relations of the Union and states practically on a war footing and make the position of the Union *vis-a-vis* the states exceedingly strong.

While there is little else to which special attention need be drawn in the division of powers there are certain other aspects of the federal-state relation which invite comment. Of these, two, the suggested nomination of the Governor by the President and the reservation of certain bills for the assent of the President have already been mentioned above. Though vested in the President, both these powers are likely to be exercised by the executive of the Union. A third special power given to the Union is that of implementing treaties and international agreements.

The proposals of the Draft Indian Constitution relating to the powers of the Union executive *vis-a-vis* that of the states bear analogy with only the powers of the executive of the Dominion of Canada. There are three special powers exercised by the Canadian Dominion Government. These are the powers of veto over provincial legislation, of the appointment of the Governors of all provinces, and the powers regarding treaties. The powers of veto have been obtained through the provision of Section 90 of the British North America Act that the powers exercised by the British Crown regarding disallowance by Order in Council of acts assented to by the Governor-General or regarding reserving a bill for the assent of the Crown shall be exercised by the Governor-General of Canada in respect of provincial legislation. The original and reserved power of the Crown to disallow legislation from which arose the power of the Governor-General to disallow provincial legislation has lapsed in the subsequent period. Prof. Keith remarks, "The history of the development of the Imperial relations is a record of the gradual disuse of control of Dominion legislation by the Imperial Government, while the means of such control remained unrepealed and potentially available. The assent of the Governor is essential to the validity of any measure of the legislature; he may withhold it, or reserve a Bill for the signification of the royal pleasure, when, unless especially assented to by the Crown by Order in Council, it falls to the ground, while, even if the Governor assents, the Crown may disallow the Act. This process, as well as the refusal absolutely of assent by the Governor, may be deemed obsolete in the Dominions."[1] The British North America Act had, however, taken this power of disallowance, etc. of legislation from the Crown in Council (Imperial) and lodged it with the Crown in Council (Dominion). The power, having been vested by the Act in the Government

1 Prof. A. B. Keith, *The Governments of the British Empire*, pp. 48-49.

of the Dominion, did not become obsolete like Imperial powers but remained active and served to modify the federal character of the Dominion Constitution. The appointment of Lieutenant-Governors of the Canadian Provinces also vests in the Government of the Dominion.

> "As has been already pointed out, the British North America Act makes no provision as to the appointment of the Governor-General of Canada. There is, in fact, no Imperial Act dealing with the subject of the appointment of the Crown's representatives in the colonies generally or in particular, unless (as in the case of the Canadian provinces) the appointment was intended to be placed in other hands than those of the British Ministry, i.e., of the Crown acting by and with the advice of the Imperial Council. The Lieutenant-Governors of the Canadian provinces are appointed by the Governor-General in Council, that is to say, by the Dominion Ministry. Their appointment is an appointment by the Crown, represented to that end by "a governing body who have no functions except as representatives of the Crown." But under the British North America Act that is the only legal method of appointment; the Crown's prerogative in that regard has been taken from the Crown in Council (Imperial) and lodged in the Crown in Council (Dominion). In Australia, on the other hand, the appointment, not only of the Governor-General of the Commonwealth, but also of the various State Governors is with the British Ministry, the Crown in Council (Imperial)."[2]

The instance of Canada is entirely exceptional; for in no other federation does it appear that the nomination of the head of a unit is made by the government of the Federation. Even the President of the Regions provided for in the constitution of the New Italian Republic is elected by the Regional Council. The Draft Indian Constitution

2 Clement, *Law of the Canadian Constitution*, 1916, pp. 148-9.

would, according to the suggestion of the Drafting Committee, place the choice of the Governor virtually in the hands of the President. It is not clear in the absence of any special provision regarding the exercise of his powers by the President whether this choice will be exercised by the President in consultation with the cabinet of the Union or will be made by him personally. Any way vesting the choice of the head of a state in the hands of the head of a federation must be considered to modify in an important respect the normal federal relation.

Article 230 of the Draft Constitution gives wide powers to the Union Parliament to make any law for any state or part thereof for implementing any treaty agreement or convention with any other country or countries. This amounts, in effect, to grant of power to modify the division of subjects as between the Union and the states in an indirect manner. The provision is directly contrary to the provision in the 1935 Act which laid down that the federal legislature shall not, by reason only of the entry on the federal legislative list relating to the implementing of treaties with other countries, have power to make any law on any provincial subject except with the previous consent of the Governor. (Section 106(1). It is also unusual for such power to be exercised by federal governments in any federation. The treaty making power in no federation is supposed to change the division of powers within the federation.

This general rule is somewhat modified in operation in the U.S.A. and in Canada. Article 6 of the U.S.A. constitution lays down that all treaties made under the authority of the United States shall be the supreme law of the land. This provision gives no special powers to the federal government, as such, in relation to any matter which is within the jurisdiction of a state. It places all treaties on the same footing as acts of Congress and makes them supreme over state laws. In the U.S.A. it should also be noted that the Senate which represents state interests has special res-

ponsibilities in respect of foreign affairs and treaties. Moreover, under this provision it is the treaty, as such, that becomes the supreme law of the land and no change in the division of powers as between the federal and state governments comes about because of any treaty, i.e. the legislative powers of the Congress are not in any way enhanced because of the subjects covered by treaties.

The second exception is that of Canada. Section 132 of the British North America Act provides that the Parliament and Government of Canada shall have all powers necessary or proper for performing the obligations of Canada, as part of the British Empire, towards foreign countries arising under treaties between Empire and such foreign countries. So long as the Dominion Government acted under these powers it was held competent to enter the sphere of even exclusive provincial legislation to give effect to treaties. However, when Canada entered into treaty obligation with foreign countries directly, Section 132 was no longer held to apply in the changed situation. The Privy Council ruled that in spite of the Dominion Government possessing the treaty making powers and also general powers for making laws for the peace, order and good government of Canada, legislative powers in the Canadian government remained distributed.

The decision of the Privy Council was criticised in Canada. An interesting justification of it was, however, offered by Prof. Keith.[3] Prof. Keith pointed out that in certain earlier decisions such as those relating to the control of aeronautics and radio communication the Privy Council, in allowing the Dominion Government, under its residual power, to regulate any matter covered by international agreement, had used language that was needlessly wide. When the issue was clearly raised as to whether the federation could impose on the provinces the restrictions regarding hours of labour suggested by the Washington

3 (A. B. Keith, *The King, Constitution, The Empire and Foreign Affairs*, 1938, pp. 123-126.)

Conference in 1919, it recoiled from fully following up the position. In doing this it was affected by the obvious results of accepting the existence of such federal power. A long trend of precedent had established a clear distinction between the Dominion and Provincial powers and the Privy Council felt itself bound to respect this division. Prof. Keith thus argues effectively for maintaining the established division of powers even for purposes of legislation necessary to implement treaties.

Section 230 of the Draft Indian Constitution does not confine itself to treaties, but talks also of agreements and conventions. It is wellknown that in recent years the scope of international agreements and conventions has become extremely wide. There is, perhaps, no subject of any importance within the competence of a state which is not covered by an international agreement or convention. Most of these agreements and conventions have a series of provisions and it is not expected that every nation shall subscribe to all parts. Because of this presumption and this practice, the coverage of international conventions is specially wide. The provision of Article 230 will, therefore, give handle to the Union Government to enter any field reserved for state legislation and will seriously upset the balance of power as between the Union and the states.

In all matters which fall within the competence of the Union, i.e. are either within the Union List or the Concurrent List no difficulty would be experienced in giving effect to international agreements and treaties. It is only in regard to those matters which are fully within the state list that the Union would have to consult the states before any convention or agreement is fully implemented. The need for such consultation is not undesirable in a federation. The state lists cover subjects which are chiefly of local or regional importance and for which the states alone are responsible. It is not unreasonable to maintain that before entering into any international agreements or con-

ventions relating to such subjects or at least before implementing them by legislation, the government of the Union shall consult the governments of the states. Though it is desirable that fairly uniform conditions should prevail within the Union, it might not always be possible to attain them because of the great differences in environment and resources of the various states. It is desirable that in matters left to the states each state should be free to decide the issue for itself. No special disability arises from such a situation. The history of the enforcement of labour conventions in most federations has brought out the difficulties of partial acceptance or acceptance by only some units quite clearly. It has so far not led any federation to place sweeping powers for implementing treaties in the hands of federal government.

The powers exercised by the Candian Government are so unusual that many writers on the Canadian constitution maintain that Canada has only a quasi-federal constitution and that its federlism is of a special nature.[4] It has been pointed out that the fathers of the Canadian federation while creating provincial legislatures intended to place with them merely "the control of local matters in their respective sections." This restricted view of the position of provinces was embodied in the British North America Act through the special provisions indicated above. The characteristic of the Indian Union has, on the contrary, been established in the first resolution of the Constitutional Assembly as that of a union of fully autonomous states. Provisions which are appropriate only to a quasi-federation and to none other are, therefore, entirely out of place in a full federation like that of the Indian Union. The two provisions of the Governor being a nominee of the President and provincial laws being capable of being reserved for the President's assent go together. They both result in vest-

4 See Scott, "The special nature of Canadian federalism," *Canadian Journal of Economics and Political Science*, February 1947.

ing in the President large powers which if exercised are bound to bring about the state and union governments in sharp conflict.

It should be noted that even though the fathers of the Canadian federation seem to have thought of provincial governments as being subjects to considerable federal control the powers vested in the Governor-General and through him in the federal cabinet have been rarely exercised. It is only in extreme cases such as that of the social credit experiment in Alberta that in recent years the power of disallowance of provincial legislation has been in evidence. It is, however, not necessary to vest federal governments with powers of disallowance of state legislation to provide for such contingencies. The extremes to which legislation in Alberta went rendered it unconstitutional. The situation could, therefore, be met by the ordinary process of questioning in a court of law the competence of state governments to pass particular legislation.

Such powers do not accord with the federal principle. Further, their exercise is likely to lead to undue interference with the autonomy of a state based, a number of times, on party considerations. Therefore, the election of the constitutional head of a state and legislation within the powers ceded to the state are matters in which it is highly undesirable that the government of the federation should have a voice.

The above is written on the supposition that the powers vested in the President will be powers that, in effect, are exercised by the Union Cabinet. If on the other hand these powers are exercised by the President personally the provision would be even more objectionable, because it would then vest in a single person general powers of review and control which would make him a personage of great political influence. Making the President person of such influence would lead certainly to a conflict with the Union Cabinet.

VI FINANCE.

The division of revenues between the states and the Union is laid down in the Draft Constitution in the manner adopted in the Act of 1935 and the details of the division are, in essentials, the same as those prescribed by that Act. The Expert Finance Committee appointed by the Constituent Assembly had recommended some modifications of this division. The Drafting Committee, however, thought it best to retain the *status quo* in view of the prevailing unstable conditions. The main difficulty of financial arrangements in federalism is the lack of balance in the distribution of governmental functions and resources. Even when it has been possible to strike a balance between the two at the inception of a federation the changing scope of powers and importance of revenues gives no guarantee that the balance will be maintained permanently. In consequence, it is of great importance in a federal constitution to provide for elasticity in the financial system and for scope for adjustment in financial arrangements.

Though the Drafting Committee has retained the present division of revenues, it has followed, in other matters, the main recommendations of the Expert Finance Committee. Apart from the revenues levied and collected independently by the states and the Union respectively, there will be duties levied by the Union but collected and appropriated by the states, taxes levied and collected by the Union but assigned to the states and taxes levied and collected by the Union and distributed between the Union and the states. The Union will have the power to levy surcharges on taxes belonging to the two latter categories, whose proceeds will belong to the Union alone. Provision has also been made for a system of grants-in-aid to states in Part I. This provision is so worded as to enable the Government of the Union to vary the amounts or proportions of the grants from state to state and to make the grants recurring or non-recurring, fixed or variable, conditional or non-conditional, etc. The

financial relations of the Union with states in Part III will be governed by the terms of the agreement of each state; the Government of the Union could undertake by such agreement the work of levy, collection, etc. of any tax in any such state. The Draft Constitution also provides for the appointment by the President, every quinquennium, of a Financial Commission which shall examine the principles governing the administration of grants-in-aid to states in Part I and the basis of the agreements with states in Part III. The Draft Constitution provides, in this manner, for a diversity of possible financial relations and arrangements and also for a periodic review of the working of the whole system..

The satisfactory working of the financial system of a federation does not depend, wholly, or even in the main, on the initial division of resources between the Union and the states. It is always difficult to arrive at even an initial division of revenues which does not require adjustment through a system of grants, etc. And the necessary later adjustments cannot, of course, be ordinarily made through the difficult and dilatory process of amendment of the constitution. The non-acceptance by the Drafting Committee of the recommendations of the Expert Finance Committee is, in consequence, not of high signficance. The present division of resources may for all practical purposes be taken as the permanent constitutional arrangement. It is unlikely that at even the end of the five year periods the division of revenues will itself be materially modified. For, such modification would require an amendment of the constitution which, in any circumstances, would not be easy to bring about. Reliance must, therefore, be placed on the adjustments in the proportions obtained by the Union and the states of those sources which are shared between the states and the Union and on the setting up of an elastic system of grants. If properly worked and revised these should provide for all the elasticity that is possible in federalism.

One major criticism, not relating to constitutional provision but to economic classification, must be offered against the financial provisions of the Draft Constitution. The Draft Constitution retains the old distinction between agricultural income-tax and income-tax other than agricultural. It treats these as two distinct sources of revenue and also allots the former, as at present, entirely to the states. There is no justification for the continued maintenance of this highly artificial distinction. The distinction may have had significance when the burden of land revenue on agricultural incomes was, at least in some provinces, heavy and it was thought necessary to adjust the system and pitch of agricultural income taxation to the land revenue system. The incidence of land revenue is now universally low; there is also a tendency towards attainment of some uniformity of conditions in this regard throughout the country. The justification for the distinction is thus loosing ground. On the other hand, the evil consequences of the maintenance of the distinction are becoming increasingly grave. There are many who hold agricultural property in more than one state. There is thus a case for bringing the agricultural income-tax within the purview of the Union. Again tax-evasion would be less easy if all property and income of one person were within the cognisance of one tax collecting authority, without the present exception of agricultural property and income. Even more important than this is the consideration that the distinction leads to a considerable loss of revenue to the state. When the two systems are separate every one, who is liable to be taxed under both, may, under each, pay a lower rate of tax than he would have to pay if his income was taxed as a whole. And the greater the progress in large-scale or capitalistic agriculture the more serious the results of this anomaly. The administration, the collection and the levy of tax on agricultural incomes must, therefore, become a part of the ordinary income-tax system

and the present distinction between agricultural and non-agricultural incomes for this purpose, abolished forthwith. It would be impossible to abolish this distinction as long as taxation on agricultural incomes is separated from the ordinary income-tax by the constitution and is allotted to a different authority. The income-tax on agricultural incomes must, therefore, be brought, in the first instance, into the Union list; the incorporation of it with the ordinary system could then follow. The proposal would diminish the revenue resources of some states immediately. This could be easily provided for by making the necessary adjustment in the proportions in which the income-tax is shared.

Another minor criticism may also be offered in connection with the chapter on Finance. The provisions of the constitution should as far as possible be confined to matters of principles or essential detail and should avoid unnecessary particularisation. This is not only because the procedure is appropriate but also because a detail or particular which is considered satisfactory today may cease to be so in course of time. When this happens, no change could be brought about in it except through an amendment of the constitution. The need for such amendments ought to be minimised. In this chapter, the mention of the duty on salt, the specific arrangements regarding the duty on jute or the details regarding the grants-in-aid to Assam, appear to be unnecessary. The detailed action or arrangement in each case is permissible under the general provisions and should not have been incorporated in the Draft Constitution itself.

VII EMERGENCY POWERS.

The President, as well as the Governors, are vested with special powers of legislation. Moreover, the President is given large powers for governance in emergencies. The

legislative powers of the President and the Governors are themselves meant to be used in emergencies. They will strengthen the hands of the executive in extraordinary circumstances, especially at times when the legislature may not be sitting. A provision of legislative powers for emergencies may be necessary and finds place in other modern constitutions also. On a comparison with related provisions in other modern constitutions the provisions of the Draft Constitution of India seem lacking in two respects. There is, initially, in constitutions such as the new French and Italian constitutions, definite prohibition of the delegation of legislative powers to government. Secondly, the limited legislative powers granted for an emergency are more carefully circumscribed than they are in the Draft Constitution of India. The chief omission in the Draft Constitution in this respect, is its failure to provide for the summoning of parliament at the outset of or within a defined short period of the emergence of a crisis. The legislative powers vested in the President, i.e. in the government, must be used only in extraordinary circumstances and when they are used, the obligation to summon parliament immediately to ratify executive decrees must be expressly laid on the executive. The following articles of the new Italian constitution will show what possible provisions can be made to guarantee this:

ARTICLE 76

"The exercise of the legislative function may not be delegated to the Government, except after determination of principles and of governing criteria and only for a limited time and for defined objectives."

ARTICLE 77

"The Government may not, without delegation of power by the Chambers, issue decrees which have the force of ordinary law.

When, in extraordinary cases of necessity and urgency, the Government on its own responsibility adopts provisional measures having the force of law, it must on the same day present them for conversion into

law by the Chambers which, even if dissolved, are convoked for the purpose and assemble within five days.

The decrees lose effect as of the date of issue if not converted into law within sixty days of their publication. The Chambers may nevertheless regulate by law juridical relationships arising from decrees not converted into law."

The special provisions made by the Draft Constitution in Part XI entitled "Emergency Provisions" stand on a different footing. There is no parallel to them in the constitutions of any of the modern representative democracies, federal or unitary. The constitution of no British Dominion contains any comparable provisions; nor does the Constitution of the U.S.A. give any powers to the executive head completely to override the provisions of the law of the constitution, because of emergency. It is on the contrary a well established doctrine in the U.S.A. that extraordinary conditions do not create or enlarge constitutional powers:

"The conditions to which power is addressed are always to be considered when the exercise of power is challenged. Extraordinary conditions may call for extraordinary remedies. But the argument necessarily stops short of an attempt to justify action which lies outside the sphere of constitutional authority. Extraordinary conditions do not create or enlarge constitutional powers. The Constitution established a National Government with powers deemed to be adequate, as they have proved to be both in war and peace, but these powers of the National Government are limited by the constitutional grants. Those who act under these grants are not at liberty to transcend the imposed limits because they believe that more or different power is necessary. Such assertions of extra-constitutional authority were anticipated and precluded by the explicit terms of the Tenth Amendment." [1]

1 Constitution of the U.S.A., *op. cit.*, p. 718.

It may be argued that the possibility of grave emergencies is now being acutely felt in India and this has led to provision being specially made for it. Many other constitutions have, however, been framed in equally troubled times. The new French and Italian constitutions may, for example, be said to have been adopted under conditions as difficult as those of India and do not yet contain any comparable provisions. The Constituent Assemblies of these countries, no doubt, laboured under full awareness of the possibility of grave emergencies arising; even so, in the making of those constitutions a definite stand was taken against the persistent demand from the right to vest the executive with large powers, especially in emergencies.

The provisions made in the Draft Constitution of India are large and sweeping. They enable the President, and through him presumably the executive, to give directives to any state and vest the parliament with power to make laws on any subject notwithstanding the division of powers contained in the constitution. In effect, the emergency provisions enable the President to suspend the constitution completely and with the concurrence of both houses of parliament this effective suspension of the constitution may continue for an indefinite period. The provision of such powers of abrogating the constitution in the constitution itself is not only abnormal but also dangerous. It is likely that in this matter as in many others the provision has crept in through the mere imitation of the 1935 Act. In many ways provisions of Articles 275-278 are reminiscent of Sections 45 and 93 of the 1935 Act. Sections 45 and 93 of the 1935 Act represented provisions made by the enacting authority (The British Parliament) to ensure that governments for which it held itself responsible should not cease to function through a break-down of the machinery set up by the Act. When there is, however, a break-down not of a subordinate but of the supreme authority no provision can be made effectively against such eventuality. The provisions of the 1935 Act can thus not serve as model for the Draft Constitution of India, in this respect.

The only parallel, in constitutions of modern sovereign states, to the provisions for emergency in the Draft Constitution appears to be that of powers conferred on the German President by the 1919 Constitution. An indication of the extent of powers of the German President and the use to which they were put should, therefore, prove instructive. The following extract states the position in brief:

> "In all this the position of the Presidency was of overriding significance. For it was the office which provided the fulcrum on which the constitution was swung from the position of guardian of a parliamentary democracy to that of a formal sanction for virtual dictatorship. The relation of President to the Reichstag was indirect. He could not initiate legislation. His chief powers were three: (1) the power to appoint the national chancellor or head of the government (Art. 53); (2) the power to dissolve the Reichstag (Art. 25), which was frequently used and was a powerful instrument in the legal revolution of national socialism; (3) the power to govern by emergency decree (Art. 48). The history of this famous article is too well known to need repetition. It is enough to say that the checks on its use, which in theory were sufficient, proved in practice to be totally inadequate."

In the Draft Constitution of India all the powers mentioned in the above extract are given to the President and he enjoys even others unknown to the German constitution such as that of the legislative veto. The power to appoint the head of the government and that of dissolution of the legislature are powers found in many other constitutions and the really contentious element is that of the power to declare an emergency and govern by decree during the time. Article 48 of the German constitution which gave these powers is reproduced below:

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2 Charles H. Wilson, "Separation of Powers under Democracy and Fascism," *Political Science Quarterly*, December 1937, p. 490.

"If any State does not perform the duties imposed upon it by the Constitution or by national laws, the National President may hold it to the performance thereof by force of arms.

If public safety and order in the German Commonwealth is materially disturbed or endangered, the National President may take the necessary measures to restore public safety and order, and, if necessary, to intervene by force of arms. To this end he may temporarily suspend, in whole or in part, the fundamental rights established in Articles 114, 115, 117, 118, 123, 124 and 153.

The National President must immediately inform the National Assembly of all measures adopted by authority of Paragraphs 1 or 2 of this Article. These measures shall be revoked at the demand of the National Assembly.

If there is danger from delay, the State Cabinet may for its own territory take provisional measures as specified in Paragraph 2. These measures shall be revoked at the demand of the National President or of the National Assembly.

The details will be regulated by a National law."

A comparison of this Article with Articles 275 to 280 and Article 188 of the Draft Constitution is highly revealing. The powers in the Draft Constitution of India are much wider than those of the Article 48 of the German constitution. In India during emergency and during times of war the whole elaborate structure of federal powers and finance will be scrapped and the state legislatures and executives will, by proclamation, be reduced to the position of local authorities. The German constitution never contemplated such a constitutional revolution every time there was a war or other emergency. The German President had powers merely to force a state to perform the duties imposed on it by the constitution or by law, but this power did not affect any provision of the constitution. And in Germany the emer-

gency powers for a state were vested in the cabinet of the state and not in its Governor as is proposed to be done by Article 188 of the Draft Constitution. Any measures taken by the President in an emergency could in Germany be revoked by the National Parliament. This provision is not found in the Draft Constitution. Moreover, the German constitution did not contain any section giving legislative powers in emergency to the President in addition to the powers under Article 48.

The emergency provisions in the Draft Constitution in effect do two separate things and the propriety of both these is highly doubtful. In the first instance they give the President power to declare a state of emergency and suspend rights and liberties. An early commentator of the German constitution had pointed out the difference in this regard between the Constitution of Germany and that of France. He wrote:

> "But, above all, he (German President) has the right to declare a state of siege. This is a peculiar point in the German Constitution. Whereas in France, the state of siege cannot be declared except by a law, in Germany it is sufficient to declare it by means of a simple order of the President." [3]

The power to declare an emergency and by doing so to suspend constitutional laws and guarantees is not possessed by any officer or authority in the British Dominions or in the U.S.A. or in the newer constitutions of France, Italy, etc. As pointed out above it was only in the Weimar Republic that the President enjoyed it in some part. The experience of its use in Germany does not warrant its introduction in the Constitution of the Indian Union. No serious inconvenience has been felt because of the absence of such power in the other parliamentary democracies.

The other aspect of the emergency provisions of the Draft Constitution is even more unusual and alarming. These provisions empower the President of the Union, by mere proclamation, to abrogate the whole federal structure.

3 R. Brunet, *op. cit.*, p. 164.

The provisions make the Union executive and legislature supreme and make it possible for the Union executive to interfere with the administration of any state in any manner without being under any necessity of proving any occasion for it, whenever an emergency is proclaimed. No parallel to these provisions is to be found in the constitution of any, even quasi-federal, constitution, past or present. Constitutional provisions to disregard the constitution are likely to be put to evil uses and in the hands of ambitious Union executives they may not only lead to an undermining of the constitutional structure but also even to the ultimate disruption of the Union.

In the new European democratic constitutions the parties of the left have consistently opposed special powers of the President and provisions for emergency as paving the way to dictatorship. In France the first draft of the constitution of the Fourth Republic was rejected in a referendum. One of the major charges against this draft was that it reduced the powers not only of the President but also those of the Second Chamber to nullity and made room for the unrestrained rule of the lower house. The second draft which was approved in a referendum represented a compromise between the left and the centre and provided for some additions to the power of the Second Chamber, but even this did not enlarge the powers of the President beyond those enjoyed by him during the Third Republic. It was chiefly the Gaullists who have advocated special provisions for emergency and special powers to the President. Under the Constitution of the Fourth French Republic the President merely designates the Prime Minister. But the Prime Minister and the colleagues chosen by him are appointed only after they have obtained a vote of confidence from the National Assembly by a public ballot and an absolute majority.

VIII REPRESENTATION OF MINORITIES.

Special provision has been made in the constitution relating to the representation of minorities. Seats are to

be reserved in the House of the People of the Union for the Muslim community, the Scheduled Casts, and the Scheduled Tribes. Similar provision is to be made in the legislative assemblies of all the states and in addition for the Indian Christian community in the states of Madras and Bombay. The President and the Governors are given power to nominate representatives of the Anglo-Indian community, if they are of opinion that it is not adequately represented. The number of reserved seats is to be in proportion to the population of the minority communities. Weightage, thus disappears. Separate electorates have also been abolished and the reserved seats will presumably be reserved in particular multi-member constituencies. The provisions are not unexpected. With the formation of Pakistan the principle of weightage had no *raison d'etre* left. The Congress Party had also been definitely committed to the abolition of separate electorates.

Though not unexpected, it is not likely that the provisions will give generally satisfactory results. Whatever the defects of separate electorates they are the only means by which specific representation can be guaranteed to minorities. Under the ordinary systems of voting, prevalent in India, a dispersed minority is not likely to obain proper representation for its views with mere reservation of seats. It was proved in the 1946 elections that the representatives of Scheduled Castes in regions like Maharashtra did not enjoy a majority of Scheduled Caste support. If, therefore, minority representation has a purpose, this cannot be well served with joint electorates, especially when the population of the minority is not heavily concentrated in particular areas.

Reservation of seats also requires the allocation of the reserved seats to particular constituencies. In an area containing a large number of small constituencies, a number of constituencies may obtain no reserved seats. As a result the minority population in constituencies other than

those to whom the reserved seats are allotted will have no share in electing representatives of the minority. Moreover, the device of reservation of seats can cover the requirements of only the specified minorities. There are numerous minority elements in India and only a few of them can be specified. For the rest, the elections will provide for the return of candidates belonging only to majority parties or communities.

This raises the whole problem of the suitability of the system of representation which has been adopted in India, following the English model. The U.K. and the U.S.A. are two countries which work with single member or small multi-member constituencies. This system makes for an exaggerated representation of small but widespread majorities and a general underestimation of representation of minorities. It is justified chiefly on the ground of political convenience. It has often been argued that without such a system of representation, two-party government would not prove possible; and Anglo-American political writers mostly argue in favour of a two-party government as the only stabilizing element in a representative democracy. It is, however, extremely doubtful whether the working of representative democracy or of the two-party system in the U.K. and the U.S.A. is directly connected with the system of representation. It is more the fundamental homogeneity in economic and social conditions that has been the stablizing element in these two democracies. Where differences among the population, whether of religion, social class, or political opinion and dogma, are sharp many political groups will emerge and the working of democracy will be less satisfactory than where such conditions do not exist. Where many forms of fundamental differences exist the proper way of meeting the situation is not to suppress them by adopting an unsuitable method of representation but to give proper scope for their expression. If such a scope is not given dissatisfaction will be generated and the only way of suppressing them will be through the emergence of a single party dictatorship.

Social, economic and political conditions in India approximate more to those of the countries of the continent of Europe than to those of the U.K. and the U.S.A. Almost all the democracies of the European Continent have found it desirable and necessary to adopt some variation of the system of proportional representation. In all these countries many groups rather than two parties have emerged and cabinet formation has proceeded on lines different from those in the U.K. In spite of the difficulties created by the emergence of groups none of these countries has given up the system of proportional representation. The political history of France from 1928 to 1939, during which years the system of single member constituencies prevailed completely, was no less disturbed than that of countries working with proportional representation. This is good evidence for maintaining that the emergence of the two-party system does not depend on the system of representation.

The case for the adoption of the system of proportional representation seems to be overwhelming in India. It is the only system which would allow for a proper representation of the numerous types of minorities that exist in India—religious minorities, social minorities, linguistic minorities, political minorities, class or occupational minorities and others. The adoption of a system of representation, such as single member constituencies, is suited chiefly to a homogeneous society; but the system is not by itself likely to lead to homogeneity. Under such a system the resentment of minorities who go without representation is likely to grow rather than to diminish. A great merit of proportional representation is that it allows for separate representation wherever a group of voters feels that it has a distinct political entity and when the feeling of separateness of any group vanishes, the system functions equally well in the event. It does not, as happens with reservation, link representation specifically, and more or less permanently, with the minority status of certain named commu-

nities or groups. It also avoids difficulties of the system of reservation pointed out above.

The adoption of proportional representation does away with the need to split up constituencies. Therefore, by its adoption, offence will not be given to those whose susceptibilities are hurt by any overt separation of the electorate into communities or sections. On the other hand, under proportional representation, all minorities which are properly organised will be enabled to elect their own representatives. In this connection two features of the system of proportional representation adopted in continental Europe, especially by the Weimar regime in Germany, are worthy of attention. Firstly, there was the provision for voting not for a person but for a party list, which was widely adopted in many Continental countries. If voting for party lists is combined with large electoral districts election would be guaranteed for all the important candidates that a party desires to get into the legislature. The other feature, peculiar to the German system, is the option offered to parties by the electoral law to associate the lists of two or three districts in a "Union" list. This device would prove specially useful for representation of dispersed minorities such as Scheduled Castes and Christians, and Muslims in certain regions. With a permissible combination of votes of various districts on behalf of a party, representation of even small and scattered minorities could be very fairly linked to their numbers, and the representation would be through persons who would be known to enjoy the confidence of the members of the community. There should be no objection to adopting such a system of proportional representation in India. The two usual charges levelled against the system, as it has worked on the continent of Europe, are that (i) it leads to breaking up representation of the electorate in sections and (ii) that, in the particular system, it has meant voting for parties and not for persons. Neither of these objections need carry considerable weight with us. A faithful representation of the views of minority communities is an important deside-

ratum with us. The sectionalisation will be proportioned to the numbers of these communities and its effect on the strength of the majority parties will not be considerable. As to voting for parties, we have been long used to it. Indeed, a large number of leaders of the Congress have often claimed that they could get any persons whom they set up as candidates elected, and have successfully exhorted the electorate not to look to men but to the party label. An adoption of proportional representation on lines indicated above would achieve the abolition of separate electorates and avoid at the same time any injustice to minorities.

It is highly likely that this solution will not commend itself to the Constituent Assembly. The party in power in India today is one which obviously believes in a strong party government and many of its leaders have recently expressed their belief in the need of a one-party government in India at present. A system of large multi-member constituencies working under proportional representation will greatly undermine the strength of this party, whose political prospects in the near future are bound up with the maintenance, as far as possible, of single-member constituencies. Therefore, it would be too much to expect the adoption of proportional representation by the Constituent Assembly of India. On the other hand, it is clear that the social, religious and political composition of the country demands special attention being paid to representation of minority views and interests and that any systematic attempt to avoid this through the adoption of an unsuitable system of representation may lead to a growth of grave maladies in the political system.

IX AMENDMENT OF THE CONSTITUTION.

Article 304 provides for amendments of the constitution. It is noteworthy that in India a general vote of the people is not being resorted to in relation to any stage of either constitution-making or constitution-amendment. The referendum, which is required for fundamental alterations ir many recent constitutions, finds no place in the Draft

Constitution of India. This may be inevitable in existing circumstances. An amendment of the constitution will require, according to Article 304, a two-thirds majority of each House of Parliament. It shall also require to be ratified by not less than half of the legislatures of states in Part I when it refers to (a) any of the lists in the seventh schedule, (b) the representation of states in parliament or (c) the powers of the Supreme Court. It appears necessary to add to this latter list the provisions of Part VI which define the constitutional structure and machinery within the states. Changes in these should also require the assent of at least half of the states affected by the change. Article 304 seems to require no other amendment in any important respect.

However, attention has to be drawn to Article 226 which confers on parliament power to legislate with respect to any matter in the State list in the national interest. The footnote to this Article states that the article has been inserted as the Drafting Committee was of opinion that power should be provided for parliament to legislate with respect to any matter in the State list when it assumes national importance. According to the Article, if the Council of State declares by resolution supported by two-thirds of the number present and voting that it is necessary and expedient that parliament should make laws with respect to any matter enumerated in the State list, it shall be lawful for parliament to make such laws. Article 226 gives, in effect, power to a two-thirds majority present and voting in the Council of State at any time to make a fundamental change in the division of powers between the Union and the states. According to Article 304 every amendment of the constitution must be passed by a majority of not less than two-thirds of the members of each house present and voting; and it further provides that when the amendment seeks to make a change in any of the lists in the seventh schedule it shall also require to be ratified by a certain proportion of the legislatures of states. The provision of Article 226 pertains to a change in the lists in

the seventh schedule. It, thus, runs directly contrary to the provisions in Article 304.

The reason given by the Committee for this amazing proposal is as follows: "The Committee has provided in effect that when a subject, which is normally in the State list, assumes national importance, then the Union Parliament may legislate upon it. To prevent any unwarranted encroachment upon State powers, it has been provided in the Draft that this can be done only if the Council of States, which may be said to represent the States as Units, passes a resolution to that effect by a two-thirds majority." If power is to be given to parliament to legislate on any question which it thinks to be of national importance all pretence at a division of powers, as in a federal system, should frankly be given up. The provision amounts to no less than undermining completely, though in an indirect manner, the federal idea and structure. Any subject and any taxing power can be taken up by the Union on the mere declaration by the Council of State of its having assumed national importance. If the Drafting Committee thought that transfer of a subject from the State list to the Concurrent list should not be hedged even with the safeguards provided for an ordinary amendment to the constitution, it would have done better to omit altogether the elaborate lists in the seventh schedule. All that it need have done was to frame one list of subjects regarding which legislatures of states in Part I might legislate so long as the subjects were not deemed of national importance. If, however, the attempt at the establishment of a federal government in India is being honestly made, Article 226 must be entirely dropped and changes in lists in the seventh schedule left to be governed according to the provisions of Article 304.

The plea of the Committee that the provision of two-thirds majority of the Council of State gives adequate protection to the states is entirely unconvincing. It is unconvincing as the Drafting Committee itself has recommended much greater safeguards even for amendments not involv-

ing a change in the division of powers between the states and the Union. Moreover, the hollowness of the plea is conclusively proved if the composition of the Council of States is carefully analysed. It has been indicated above how the Draft Constitution insufficiently defines the composition of this Council. As defined in the Draft Constitution, the Council of States will consist of 250 members of whom 15 will be nominated. Of the remaining 235 a maximum of 40 per cent may be representatives of states in Part III and there will be some representatives of the states in Part II. In view of the comparatively large number of states in Part III it is likely that the allotment of actual seats to them will be near to the maximum. Forty per cent of 235 is 94. It may be then safely assumed that the total unmber of representatives of states in Parts II and III will not be less than 95. This leaves the total number of representatives of states in Part I in the Council as not more than 140. It must be emphasized that neither states in Part II nor those in Part III are affected by a change in the lists in the seventh schedule. States in Part II are local authorities of the Union and the powers of the states in Part III are protected by their special agreements and will be unaffected by any changes in the lists of subjects. Therefore, if Article 226 stands, the consequences will be that even with a minority of the representatives of the states, actually affected by the change voting for it, a fundamental alteration in the division of powers could be brought about. Two-thirds majority of 250 would be equal to 167. Out of the 140 possible representatives of the states in Part I a minimum of 57 who are favourable to a change, joined with others whom the change does not affect, could bring it about in the lists according to Article 226. Article 304 gives some protection to the states in Part I because in addition to the more stringent majorities in both houses it requires that at least half of the legislatures of states in Part I should approve of a change in the lists in the seventh schedule. As long as the present differentiation in status and relations of various types of states

persist it is dangerous to accepe the Council of States as a general guardian of state interests. The reason put forward by the Drafting Committee in support of Article 226 thus loses all its force on a detailed examination. It must, in addition, be emphasized that according to the experience of all federations a vote of the representatives of a state in the federal second chamber has not the same significance as the vote of the legislature or the peoples of the state the latter express more specially the point of view of the states.

X CONCLUSION.

In the preceding observations comment has been offered on those features of the Draft Constitution which seemed to require special attention. The position in relation to the Indian States is yet fluid and ill-defined and it is of the greatest importance that the future development on sound lines of the situation in this regard should be fully guaranted. Much attention has, therefore, been devoted to this problem. The preservation of the fundamental rights of the citizen and the non-abuse of emergency powers depend, perhaps, more largely on the spirit with which the constitution is worked and the quality of the citizens in democracy than on the phrasing of constitutional provisions. However, it is necessary, at least, not to guarantee wide rights in directions in which they will lead to a further entrenchment of vested interests. That is why special attention has been drawn to the surprisingly wide protection given in the Draft Constitution to rights of private property. The system of election of representatives influences in a material way the working of a democracy. The existing system and the system most likely to be adopted appear inappropriate to Indian conditions and an urgent plea for the adoption of the system of proportional representation has been made, even though the possibility of its acceptance appears remote.

In the structure of the constitution two aspects require special attention. The first is the position and powers of

the President and the Governors. On this question the framers of the Draft Constitution appear to have been misled by the 1935 Act. The theoretical framework of the 1935 Act cannot hold good for the Constitution of the Indian Union. The Crown, the Governor-General and the Governors formed a definite hierarchy in the 1935 framework. All powers was derived from the Crown and the heads of the Dominion and of the Provinces were representatives, in a graded order, of the Crown. In a federation the heads of the states and the head of the federation are not similarly placed. Because the Crown was the pivot of authority the form of the constitutions of even the self-governing Dominions in the British Empire exhibit a unity of concept and a gradation of authority, with reservation of powers to the Crown, which is entirely inappropriate in the case of an independent federation. Even in the Dominions, however, though the unitary form has remained, actual practice has long rendered obsolete the formal provisions.

All provisions which appear to make the Governors in any manner subordinate to the President are not only inconsistent with the federal principle but will also lead either to a diminution of the autonomy of the state or to a conflict between the state and union authorities. The Governor is the head of a state, the President that of the Union; the states in their own sphere are autonomous units and their constitutional head, to the extent of his own powers, should not feel subordinate to any external authority.

Another direction in which the Act of 1935 has misled is in the powers given to the constitutional head. The theoretical framework of the 1935 Act, as also provisions made for exercise of special powers by the representative of the Crown, made it necessary to vest some discretionary powers are not only now unnecessary but also they are likely to lead to constitutional difficulties. It is now generally recognized that the possession of only two powers by the constitutional head is compatible with the working of a cabinet system. These two powers are: (1) choice of the

Chief Minister and (2) dissolution of the legislature. The exercise of even these two has to be confined within narrow limits. Possession of larger powers by the constitutional head is dangerous in a cabinet system, and might lead to serious conflicts. The reserve powers of the Governors or Governor-General in the 1935 Act had special connotation. In the new Constitution of India any reserve powers will merely lead to the possibility of the constitutional head unduly influencing or even hampering the work of the proper executive, the state or the Union Cabinet.

A constitutional head who takes an independent line may prove embarrassing to the working of the cabinet system even when not possessed of wide constitutional powers. This was illustrated by the instance of the French President M. Millerand. M. Millerand did not attempt to exercise any special powers, but he spoke on a number of occasions as if he were almost an independent Prime Minister and in his speeches he took sides on issues of internal and external politics. And when he hinted that he might use his latent power of dissolution in a certain unusual way, crisis was forced. The issue was settled by the resignation of M. Millerand after a "strike of ministers."[1] The cabinet system can work properly only when the constitutional head is perfectly correct in his behaviour and extremely circumspect in his utterances. It is not certain that Indian politicians, many of whom may be elevated to Governorships, will exhibit the quality of restraint to the full requirement.[2] It is, in the circurmstances, at least necessary to see that the constitutional definition of the powers of the President and the Governors does not go beyond the absolute minimum.

The most important respect in which the Draft Constitution requires reorientation is that of the Union-States

1 For details see Middleton: *The French Political System*, 1932, pp. 199–203.

2 Complaints are already being made that Mr. Rajgopalachari has openly expressed opinions on highly controvertial questions like that of Linguistic Provinces in a manner inconsistent with the position of the Governor-General.

relation. There are five major points in regard to which the Draft Constitution offends against the accepted pattern of federation. These are: (1) nomination of Governor by President; (2) reservation of state legislation for assent of President; (3) powers of Union parliament to legislate for implementing treaties and international agreements; (4) power of parliament to legislate on subjects in the exclusive State list where they are declared to have assumed national importance by a two-thirds majority of the Council of State; and (5) power of President to suspend the whole federal structure in a state of emergency or war. All these powers make the Union much less than a federation. Logically their active exercise may lead to the states being reduced to the position of Provinces under the 1919 Act.

The introduction of these deviations from the federal principle may be justified on two grounds: (1) because they are required to make the Union government strong or (2) because, in India, such a bias to development in the direction of a unitary government is desirable and necessary. As regards (1) it needs to be emphasized that having a quasi-federation is not the same as having a strong federal government. A federal government is strong which has an adequate field of legislation and executive authority and which has ample financial resources. According to these criteria the government of the Indian Union will, given the division of powers and finance in the Draft Constitution, be a strong government. A quasi-federation is one in which powers are given to Union government, *vis-a-vis* states which are appropriate to a unitary and not to a federal form. The powers may not make the federal government more strong. Most of the features indicated above do not add to the strength of the Union government, except in so far as the capacity to influence governments in the states in the matter of their domestic affairs is supposed to make the Union government strong. The Union government, in a quasi-federation, does not become more strong but its influence becomes more

all-pervasive. The issue, therefore, turns on the second ground mentioned above. Will a pure federal form of government work better in India to-day than a form inclined towards the unitary type?

Bryce has pointed out that "Federalism furnishes the means of uniting commonwealths under one national government without extinguishing their separate administrations, legislatures and local patriotisms" [3] and that in the U.S.A. "To create a nation while preserving the States was the main reason for the grant of powers which the National government received." [4] Lack of sufficient homogeneity and traditions of separate existence among important sections has everywhere been the justification for the adoption of the federal form. Many factors have made for the lack of homogeneity. They are, extent of the area which was sought to be embraced within the federation, diversity of geographical conditions, of historical traditions, of racial and religious composition, and the existence of multi—linguialism. All these have not been present in an equally pronounced degree in all federations. U.S.A. and Australia are examples of unilingual federations; Switzerland that of a federation within a small and compact area. The factors mentioned above are, however, all present in India in a higher degree than in any other federation, excepting, perhaps, the U.S.S.R. Above all, the co-existence of many linguistic groups has nowhere been found compatible with the formation of a unitary state having the constitution of a representative democracy. [5]

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3 Bryce, *American Commonwealth*, 1903, Vol. I, p. 350.

4 *Ibid*, p. 353.

5 South Africa may be cited as a possible exception to the above rule. However, the unitary form of the South African Constitution is considerably modifide in practice, by the working of the provincial system. And the South African Constitution took its unitary form owing to highly exceptional conditions within that country. The challenging racial problem reinforced the argument for a unified government and the adoption of the federal form was also made inappropriate by the fact that neither of the two national groups in South Africa was confined to a single region. cf. Brady, *Democracy in the Dominions*, 1947, Chapter 15.

There are obvious reasons why a multi-lingual state must take the federal form. Democratic government is reduced to a nullity if the language of the bulk of the people in any region is also not the language of the administration of that area. Where the regional languages differ, the governments of the various regions must be separately organized for the majority of the administrative departments. A major difference of language between regions also usually connotes differences in social structure and cultural and political history. The large number of distinct major linguistic regions and societies which constitute India make it highly unrealistic to talk in terms of anything but a strictly federal constitution for the country.

The Indian Union is a very young state which exhibits not a single characteristic of homogeneity or of even close integration. The creation of Pakistan, which broke up such geographical integration as India of the British Empire possessed, did not at the same time, lead to even complete religious homogeneity within the Indian Union. The main units within this Indian Union are the regions of Hindu-Sikh Punjab, Rajsthan, Gujarat, Maharashtra, Karnatak, Kerala, Tamil Nad, Andhra, Orissa, Hindu Bengal, Assam and the large central region which may be called Hindusthan, if the term is used in its narrower connotation. Logically, the schedule of states of the Contitution of the Indian Union should contain the above list. Ultimately, the schedule will, no doubt, be so constituted. For the time, however, not only are survivals from the past delaying the attainment of the logical structure but also some of the most important political leaders in India are working actively against the logical process. The simple and obvious proposition that the formation of unilingual state units is the essential preliminary to the formation of a strong and healthy federation is being denied and even derided. This opposition to formation of unilingual units requires consideration as the same forces which want to put off the formation of unilingual units are also responsible

for sponsoring the constitutional features which mark a departure from the federal principle.

The logic of the demand for the immediate formation of unilingual units appears unassailable. The creation of strong and homogeneous primary units is the only lasting basis for the erection of a strong Union. The plea for postponing the formation of such units is, on the other hand, tantamount to postponing the advent of democracy in the existing multilingual units. No progress in the direction of the adoption of the regional language as the language of administration can take place as long as the multilingual units exist. Moreover, no major obstacles present themselves in the formation of unilingual units. The oft-repeated argument that the process of redistribution of territory will lead to bickerings and some disputes between linguistic groups has little force. For, even greater disputes and continuously worsening relations leading, perhaps, to a breakdown of administration in some units can be the only result of a continuous denial to large masses of people of the fundamental right to form their own homogeneous administrative units.

In the light of these considerations, it would appear incredible that important leaders should take the attitude that some of them are assuming. Partly, no doubt this is the result of the same uninformed, vaguely emotional and intellectually confused state of mind that the majority of Hindus exhibited when confronted with the Hindu-Muslim problem. However, the opposition has stronger roots also. It emanates obviously from interests who would profit from the continuance of the present chaotic conditions. In the main, these comprise the classes of economic and intellectual exploiters who prospered greatly during the British regime. As happens with all forms of imperial rule, the British deliberately discouraged local and regional ties and interests. The communities who had no roots in any region, therefore, found the conditions under the British highly congenial to themselves.

Other enterprising communities also left their home regions in large numbers and roamed all over the country. To all these the formation of unilingual units is unpalatable. They fear that regional interests will be, in the event, more carefully looked after and the present field of exploitation may become narrower. These communities though numerically insignificant hold a concentration of economic power in their hands and are strong in the services and even in the higher ranks of political leadership.

The strength of this opposition has been greatly increased by a new and powerful factor. This is what must be termed the emergence of a quasi-imperial strain among certain elements of the speakers of Hindi. The main issue in this context is the status of the languages of the various states. The Indian Union has no "national" language in the proper sense of the term.[6] It has a number of major languages which would appropriately become languages of the respective federating units—the states. Among these languages the language which becomes the state language of the central region—call it Hindi or Hindustani—will also have to be made the language of the federation. The claim of some of the speakers of this language is that it should hold the same place in the Indian Union that English held under the British. The claim thus extends to advocating the use of the federal language in the internal administration of every state and its use as the medium of higher instruction all over the Indian Union. It would be foolhardy to predict the future developments in the use and importance of various languages in India. It is clear, however, that if the federal language is to take the existing place of English the logical consequences of that step must be clearly and consciously accepted. These are: (1) The fortune of all Indian languages other than the federal language is, in the event, sealed. They could undergo no further growth or development and would become extinct within a comparatively short period. During the British regime,

6 See Gadgil : *Federating India*, 1945, pp. 20-21.

the place of English was supposed to be artificial by the bulk of the people and every one looked forward to its ultimate displacement by the regional language. In the new dispensation the place of the federal language will be deemed permanent and the local language, not having any prospect of ever becoming the language of administration and higher instruction, must soon lose vigour. In such circumstances, it would be highly desirable to make the transition as short as possible and to root out rapidly all languages other than the federal language. (2) As long as this does not happen the language of administration would, as in the past, not be the language of the bulk of the people. The change from English to the federal language would thus immediately involve a change for the peoples of majority of the states of the Indian Union similar to the changeover from British India and the State of Hyderabad in the past. The people would have the satisfaction of knowing that the language of administration, though foreign to them, was an Indian tongue and that the bulk of bureaucracy was only from North India. (3) Ultimatelly, of course, the idea being to root out the language other than federal, a stage would be reached when the mother-tongue of all the people would be the federal language. The process may, however, take some generations and will depend, among other things, on the spread with which the educational system expands. Today, the vast majorty of the people are illiterate and know no languages other than their mothertongue. For many years, at least, the general system of education is not expected to progress beyond the primary four standards. Ordinarily, instruction at this stage is completely through the mothertongue. Some smattering of the federal language may become widespread among the bulk of the population only when a generation grows up which has passed through a system which makes schooling free and compulsory much beyond the age of eleven.

Not all the rootless communities or vested interests agree with this new imperialism of Hindi. The bulk of these

would, perhaps, prefer not to disturb the old established position of English at all. An important section of the Muslims in the Indian Union has also swung over, after the creation of Pakistan, to the side of the retention of English. The supporters of English and those who would advocate that Hindi should take the place of English everywhere are, however, agreed in their opposition to raising the present status of the regional languages and are therefore, also opposed to any further creation of unilingual units. In the latest terminology of India demagogy, to oppose the raising of the status of the Indian languages, and, to advocate the indefinite retention of all multilingual state units is "nationalism," to plead that for the linguistic groups who are today divided among multilingual units the substance of independence cannot be said to be achieved and no beginning can be made with social, political and economic reconstruction unless they are brought together in unilingual units, is the hall-mark of "provincialism;" and to say that the reformation of state units must take place at the same time as the Constitution of the Union is formed is tantamount to bringing into danger the security of the Union.

The above appraisal of the alignment of forces against the creation of unilingual states may be reinforced by an interesting bit of indirect testimony. The London Economist included the following observation in one of its notes on Hyderabad:

> "Finally, the "Andhra movement" for the unification of the speakers of Telugu (who inhabit northern Madras and most of Hyderabad) would present a difficult problem if Hyderabad State were dissolved; it would involve the partition of Madras as well as of Hyderabad. With all these troubles likely to ensue from a victorious march into the Nizam's capital, second thoughts may still prompt Indian Ministers to work for a genuinely agreed settlement." [7]

7 *The Economist*, July 31, 1948 p. 178.

There is little doubt that the comment reflects, in part, the actual political situation in India. There are undoubtedly some "nationalist" ministers who would have preferred an agreement with the Nizam to opening out the possibility of the unification of all the speakers of Telugu. And, it is quite likely that even after the "police action" against Hyderabad these ministers may still succeed in keeping intact this artificial political unit which, however, has the high merit of being not only multilingual but also of being able by its continued existence to frustrate the aspirations of the three most troublesome linguistic groups, the Andhras, Kannadigas and Marathas. In the event, it would not be at all surprising if retaining the integrity of Hyderabad State soon becomes the supreme aim of "nationalist" statemanship.

There is indeed a fundamental difference between the two views regarding the nature of the Indian Union. On one view the Indian Union is a federation of peoples like the Punjabis, the Marathas, the Tamils, Bengalis, Biharis, etc. These, in spite of marked historical, linguistic, etc. difference, are bound together by the tie of a common cultural tradition and the recognition of the great advantages of common political action. They now come together in a federation in which they believe that they can work together for common political and economic aims without necessarily losing their individuality. It is, indeed, the hope that the fuller development of the traditions of each region will both enrich the common culture and reinforce its binding strength. On this view a strong government of the Union and a well-marked sphere of independent state action can be reconciled, in the usual manner, by a federal constitution. The other view is that India is a mere geographic region and that to acknowledge the facts of different languages and interests of different regions brings the security of the Union into danger. On the latter view all concessions to federalism are unfortunate. The Union must have powers, at will, to subvert the federal

structure and to change the division of powers; the Governor must be deemed subordinate to the President; and the President and the Union Executive must possess large reserve powers. The view leads virutally to a continuation of the British system and embodies the British attitude. For example, on the former view the office of the Governor of a state would symbolise the headship of a people. On the latter view, nationalism is properly vindicated only by appointing as Governors, persons who are completely unacquainted with the local tradition and circumstance and who preferably do not know even the language of the state. This is the view expressed in the appointment of Governors during the last year and it is also reflected in the provisions of the Draft Constitution.

The forces of the Right are conspiring to deny the realities and are evidently keen on introducing the unitary features, pointed out obove; these features will, at the same time, make possible an easy a transition towards authoritarianism. On an estimation of the strength of the forces of the Right it appears likely that the present trend towards deliberately suppressing the federal features of the constitution and of depressing the position of the states may be persisted in. The immediate results of such persistence, it is impossible to predict. On an objective analysis of the present and the long-range situation it would, however, become clear that such a course of action is full of grave dangers for the smooth working of the Constitution of the Indian Union and for the strength and quality of its cohesiveness.

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